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Expanding the Negligence Concept: Retreat from the Rule of Law

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Expanding the Negligence Concept: Retreat from the Rule of Law

JAMES A. HENDERSON, JR.*

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INTRODUCTION

That recent years have witnessed revolutionary reforms and developments in the common law of torts, and particularly in negligence, comes as no surprise to anyone teaching, studying, or practicing in this field. That these reforms and developments have been supported by a substantial majority of legal writers is equally obvious to anyone familiar with the literature on the subject. What may not be so obvious, and therefore what I have chosen to advance as the thesis of this article, is that these widely welcomed developments, taken together, seriously threaten the integrity and even the survival of the system of negligence-based liability toward the improvement of which they were originally advanced. Simply stated, we torts people, especially the torts teachers and scholars among us, are in serious trouble; and the sooner we wake up to what we are doing to ourselves and to our subject, the better.

The source of the difficulty, as I shall attempt to demonstrate in the following analysis, is the tendency in recent years to focus upon the substantive objectives of our liability system almost to the total exclusion of any shared concern for the realities and limitations of the processes by which those objectives are realized. The overlooked fact is that adjudication has limits which may be exceeded regularly only at great risk to the integrity of the judicial process. The most basic limit of adjudication is that it requires substantive rules of sufficient specificity to support orderly and rational argument on the question of liability. The reforms and changes in the law of negligence in recent years have, purportedly to advance identifiable social objectives, eliminated much of the specificity with which negligence principles traditionally have been formulated. We are rapidly approaching the day when liability will be determined routinely on a case by case, "under all the circumstances" basis, with decision makers (often juries) guided only by the broadest of general principles. When that day arrives, the retreat from the rule of law will be complete, principled decision will have been replaced with decision by whim, and the common law of negligence will have degenerated into an unjustifiably inefficient, thinly disguised lottery.

Specifically, my objectives in this article are: (1) to develop a basic theory of adjudication which reveals both the limits of that process and the necessity for relatively specific rules of decision; (2) to explain the manner in which traditional negligence doctrines have served to render the liability issue adjudicable; (3) to describe recent substantive developments in the law of negligence in a way that will demonstrate the threat they pose to the integrity of our traditional common law liability system; and (4) to suggest steps which must be taken to reduce

the threat and to help to assure the continued vitality of our torts system. In the course of my analysis, I shall have some unkind words for torts scholars and writers. Much of what has been published in recent years has been relatively indifferent to the problems raised here; some of it has been downright irresponsible. However, I do not intend to create the impression that I am alone in the concerns herein expressed. A number of torts writers have expressed concern over the workability of a system of tort liability guided only by general principles. It is in the hope of bringing others over to this point of view that the following analysis is offered.

I. THE LIMITS OF ADJUDICATION

Adjudication is a social process of decisionmaking in which the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal¹ which is bound to find the relevant facts and to apply recognized rules to reach a reasoned result.² It is certainly not the only process of decision in which interested parties are afforded the opportunity to participate—elections call for participation through voting, and contracts involve participation through negotiation. But adjudication is unique in that each affected party's participation takes the form of a claim, supported by proof and argument, that established legal rules entitle him to a favorable result as a matter of right. The dominant mood with which a judicial tribunal approaches its task of decision is that of seeking, in accordance with applicable rules, the single right result in each case.³

It follows from this characterization of the nature of the litigants' participation in adjudication that only certain kinds of problems, or at least problems which are framed in a certain way, lend themselves to being solved rationally by the adjudicative process. Essentially, these are problems to which recognized rules of decision apply sufficiently

¹ The word "tribunal" is employed here to emphasize that I am not referring to the judge, as such, but to the judicial institution as a whole. I shall employ the word "court" in the same way—to refer to the institution, very often judge *and* jury, by which torts disputes are adjudicated.

² See Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 19. I am indebted to Professor Fuller for the basic principles regarding the nature and limits of adjudication. See also Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534-39 (1973).

³ I am aware of the influence in recent years of the legal realists and the tendency for lawyers today to recognize that courts do, and must, exercise discretion in deciding cases. See, e.g., authorities cited in note 25 *infra*. However, I would insist that my statement, hedged with the notion of "dominant mood," is accurate and useful. See K. LEWELLYN, *THE COMMON LAW TRADITION* 24-25 (1960).

limiting the range of inquiry and isolating the issues presented so that each issue may be addressed by the parties in turn, to the temporary exclusion of the other issues. There may be a relatively large number of issues to be decided which may be, and usually are, related logically to one another. But as each is addressed in argument, the litigants may temporarily exclude consideration of the others and assume a favorable result with regard to them. The common law of contracts provides some of the clearest examples of problems framed in such a way as to lend themselves readily to adjudication. Potentially, at least, a contracts case involves the resolution of one of the most unadjudicable problems imaginable—the allocation of scarce resources in society. However, the case is rendered manageable by the legal rules, recognized by courts to govern liability in contract, which operate to present the issues in a way that supports meaningful participation by the affected parties. The parties argue over whether the elements of a contract are present, not over whether a particular allocation of resources is in the overall best interest of society.⁴ A relatively large number of issues may be presented—*e.g.*, offer, lapse, acceptance, breach, excuse, and measure of recovery; but the issues will have been arranged and ordered by the law of contracts so that the parties may address them in an orderly sequence. The participation of the parties in the decision of such a case will be meaningful in the sense that they will be able to rely upon established rules of decision and to argue as a matter of right for a judgment in their favor.⁵

⁴ To be sure, considerations of reasonableness and public policy play a part in the argument and decision of even technical contract issues. *See, e.g.*, L. SIMPSON, *CONTRACTS* § 102 at 212 nn.24-26 (2d ed. 1965). But only in a limited and relatively formal way are the "interests of society" recognized as part of the actual criteria for decision. *See id.* §§ 314-21 at 430-56. On a philosophical plane, it is probably true that even the most formal rule may require that the interests of society be considered in its application. *See note 27 infra* & text accompanying. However, practically speaking the formality of contract law reduces the necessity of such considerations to a workably minimal level.

⁵ I should emphasize that in speaking of recognized rules of decision as prerequisites to adjudication, I do not intend to imply that courts are incapable of playing a role in the creation and development of such rules. Obviously, courts have traditionally, and quite properly, participated in the common law process of formulating and refining rules of decision. *See generally* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1952); R. KEETON, *VENTURING TO DO JUSTICE* (1969); K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960). Because my quarrel is not with judicial law reform, as such, but rather with the particular nature of recent reforms in tort law, an in-depth exploration of the methods by which courts create law is beyond the scope of this paper. Suffice it to say that the phenomenon which concerns me here—*i.e.*, the abandonment of formality in the rules governing negligence-based liability—poses very different, and more serious, problems than does the phenomenon of courts engaging in the continuing process of rule creation, refinement, and reform.

Most of the problems which arise every day in our society are not the subject of relatively specific rules of decision, and therefore are unadjudicable. For example, solutions to problems such as "What shall I eat for lunch today?" or "What shall my family and I do with ourselves during our next vacation?" or "How shall our society react to the physical degradation of the environment?"⁶ cannot sensibly be adjudicated because of the absence of recognized rules of decision narrowing and issue isolation which would permit these problems to be addressed rationally by the affected parties urging the tribunal to arrive at a single right result. Instead of being arranged in an essentially linear manner, as are the issues in a classically legal problem, the issues, or elements, in these problems are interrelated in such a way that sensible consideration of any issue, or element, requires the simultaneous consideration of most, or all, of the others. Because adjudication requires problems the various issues and elements of which may be taken up in an orderly sequence, it follows that adjudication is not suited to solving the problems last described, at least in the absence of rules of decision which serve to narrow and isolate the issues presented.

Of course, simply because these problems do not lend themselves to being solved by adjudication does not mean that they are incapable of intelligent solution. Processes of decision which do not depend upon recognized rules of decision are perfectly suited to addressing open-ended problems of the sort with which we are here concerned. Two such processes deserve special mention: contract negotiation and the exercise of managerial authority.⁷ In contract negotiation, the affected parties work out a mutually acceptable solution through the give-and-take process of arm's length bargaining. Managerial authority is exercised when one person has the authority to impose his own, discretionary⁸ solution upon those affected thereby. Once again, the difference between adjudication and these other processes of decision rests not only upon the presence in the former of relatively specific rules of decision, but also upon the very different way in which the affected parties participate. Although the exercise of managerial authority may superficially resemble adjudication, in actuality the manager acts differently from a court.⁹

⁶ The assumption here is that there are no applicable rules of decision. Stated in this fashion, these questions are clearly unadjudicable. We will consider in a later section the extent to which problems involving harm to the environment are being rendered amenable to adjudication. See pp. 495-50 *infra*.

⁷ See generally Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L L. 1, 5.

⁸ The implications of the term "discretionary" are developed later. See notes 25-27 & text accompanying.

⁹ Again, I am using "court" in its broad sense. See note 1 *supra*.

Thus, the persons affected by the manager's decision might be given the opportunity to plead for a favorable result, in the sense that they might be allowed to exercise their vocal chords or practice their typing. But without sufficiently specific rules of decision, their participation would not be the sort guaranteed at the outset. In the end, bound by no legal rule of decision, the manager would be left to decide the case largely on his own, employing common sense, or instinct, or intuition.

To appreciate more fully the way in which legal rules function in permitting litigants to participate meaningfully in adjudication, it will be helpful to consider a concrete example of what would happen if for some reason the rules of decision failed to perform their above-described function of limiting and isolating the issues presented. Let us consider the second hypothetical example of an unadjudicable problem advanced above—*i.e.*, the problem of planning the family vacation. In most instances, of course, families are able to work out amicable solutions to this problem by means of a combination of negotiation and managerial authority. However, it is not difficult to imagine an otherwise happy family of four (husband, wife, and two teenage children) hopelessly fragmented over such a problem.¹⁰ What would happen if a court were to undertake to resolve the question of where the family should go, and what it should do, on its next vacation? One can easily envision each of the four affected family members being given the opportunity in court to plead, in turn, for a result favorable to him or her. Depending upon how it were handled, such a proceeding could certainly be made to resemble adjudication, at least superficially. However, assuming that economic circumstances permitted a fairly wide range of choice, and assuming there were no more specific guide to decision than "what is best for the family,"¹¹ or "the most reasonable compromise," would the parties be able effectively to participate as litigants in the decision process in accordance with the classic adjudicative model advanced earlier?

Most emphatically, "No." In the absence of recognized rules which might serve as the basis for making a principled decision, the permuta-

¹⁰ It will be observed that the tangential, though superficial, problems of too few litigants (*e.g.*, the problem of today's lunch menu, *supra*), or too many (*e.g.*, the environmental degradation problem, *supra*), are not presented. These problems are superficial because they can be solved by adjusting the procedural rules governing class actions and standing to sue. See notes 95-96 *infra* & text accompanying.

¹¹ Obviously, a court might look to family custom for a sufficiently specific rule with which to decide the case. Thus, if in a particular family it were customary to have vacation plans determined by a single family member each year, the members taking turns, the issue of "Which vacation?" could be transformed into the more manageable question of "Whose turn is it this year?" However, I am assuming no such custom is available.

tions and combinations of considerations which would enter into the intelligent planning even of something as relatively mundane as a family vacation would inevitably frustrate the most skillful litigant and the most conscientious decisionmaker.¹² The issues of monetary costs, alternative dates, modes of transportation, possible destinations, durations of stay, types of accommodations, etc., are all interrelated in the non-linear manner described above, and a decision with regard to any one could intelligently be made only in relation to decisions with regard to most, or all, of the others. Even if the court were to choose a single issue—total cost, for example—upon which to focus initially, any resolution of that issue would only be tentative in that it would have to be reconsidered in rationally resolving the next issue—*e.g.*, the mode (and hence the cost) of transportation. And then the first two issues would be “upset” once again when the third issue—*e.g.*, alternative destinations—was reached; and the first three, when the fourth was reached; and so on.¹³

In the end, the attempted adjudication of such a problem would be transformed, perhaps subtly, into something other than a trial in which litigants “present proofs and arguments to an impartial tribunal bound to apply recognized rules to reach a reasoned result.” Either the court would bring pressure upon the parties (in the extreme, perhaps, by threatening to deny them any vacation at all) to work out a compromise solution among themselves; or the court would appoint one family member to make the decision for the family;¹⁴ or the court would assume the role of a benevolent head of the household who, though willing to listen patiently to the entreatments of those affected by the decision, would be free to reach a solution by the exercise of managerial authority, bound only by the limits of common sense.¹⁵ If, as is likely, the latter course were followed, the shift from the adjudicative mode to the dis-

¹² Once again, I am not suggesting that intelligent vacations are incapable of being planned, but simply that they cannot be planned in court. Traditionally, families do a rather good job of planning their leisure activities through a combination of managerial authority and negotiation. (The more “liberated” the family, the more the emphasis tends to be upon the latter.)

¹³ Fuller employs two other examples which may be helpful: dividing an art collection between two museums on the basis of “Which division is best?” and assigning personnel to a coachless football team on the basis of “The most effective lineup.” See Fuller, *Adjudication and the Rule of Law*, *supra* note 7, at 3-4.

¹⁴ More than likely, the court would appoint the head of the household to make the decision, although family custom might suggest a different approach. See note 11 *supra*.

¹⁵ It is likely that a conscientious judge undertaking such a decision would eventually convince himself, contrary to reality, that he was acting according to law. For an example of what can happen when judges are forced into the position of rendering decisions in these “Where shall we go on our vacation?” cases, see note 105 *infra*.

cretionary, managerial mode would not be lost on the participants, who could be expected correspondingly to shift their arguments away from the confusing details of the various alternatives and towards appeals to the court's sympathies, prejudices, and emotions. Once this shift occurred, the parties would become supplicants rather than litigants, and whatever the court's decision in such a context, it would not be the product of adjudication.

Accepting for purposes of argument that a case of the sort just described would be unadjudicable, is the situation altered significantly if we posit a joint action by the wife and children seeking to have the court review and set aside vacation plans already arrived at by their husband-father? That is, does the case become manageable if we assume a unanimity of interest on the part of the wife and children, joined against their self-styled patriarch? Here, the court would not be asked to fashion a vacation plan and impose it upon the family, but rather to review a plan already devised by the head of the household. Would this difference render the case adjudicable? The answer depends upon the legal basis of judicial review. For example, were courts to set vacation plans aside only if "irrational," the range of inquiry in our hypothetical case would probably be sufficiently limited to permit the parties to participate meaningfully as litigants in the process of judicial review. To be sure, relatively few cases would end in results favorable to plaintiffs under such an approach. But the fact remains that irrationality as a basis of judicial review and decision probably would suffice to support meaningful, orderly argument.¹⁶ On the other hand, were the courts in such cases to uphold or set aside vacation plans made by heads of households depending on whether the plans met some test of "reasonableness"—*e.g.*, whether the plans were "good for the family"—judicial review of vacation plans would surely retain enough open-endedness to frustrate meaningful participation by the litigants. Implicitly in every case decided on that basis, and more explicitly across a range of cases, the courts would be required to adjudicate solutions to the same intractable problem—"What is a sensible, reasonable family vacation?"—encountered in the four-party case considered earlier.¹⁷

¹⁶ Courts have traditionally used similarly narrow bases of review of administrative action for the very same process reason—to reduce the open-endedness of the problems brought before them for decision. *See* K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 29.01-.07 at 525-38, §§ 30.04-.05 at 549-51 (3d ed. 1972). To the extent that courts adopt narrow bases of review, they delegate a major part of the responsibility to the extrajudicial decision-making agencies. To be sure, to the extent that the extrajudicial agencies exercise discretion, "rule of law" problems may arise. But in our system, fairly wide agency discretion has long been recognized as a legitimate necessity. *See id.* at 15-23. *Cf.* notes 106-10 *infra* & text accompanying.

¹⁷ Passing judgment on the reasonableness of conduct implies a relatively particularized

Of course, cases involving the reasonableness of family vacation plans never actually get into court in our system of law. There are no generally recognized legal rules, absent contract, upon which family members may sue one another over the question of what to do with their leisure time.¹⁸ In effect, our system avoids these potential difficulties by adopting a "no duty" stance with regard to a wide range of intrafamily disputes.¹⁹ Responsibility has thus been delegated to the heads of households to exercise managerial authority in making binding decisions regarding such matters. To be sure, under some circumstances a wife may sue her husband for support;²⁰ and a parent's supervision of his minor children may be suspended or terminated for abandonment or neglect;²¹ but the rules traditionally governing such disputes are relatively specific and limited in a way which avoids open-ended questions such as "What shall we do on our vacation?"²²

If one searches for a shorthand way of referring to the problems which are unsuited to being solved by adjudication, several possibilities present themselves. A leading writer has referred to them as "polycentric," or "many-centered," suggesting the non-linear way in which the issues in such problems are interrelated.²³ Another useful term might be "open-ended," emphasizing the lack of defined limits upon inquiry and argument. Or, observing that these problems necessarily involve the decisionmaker in the processes of planning and design, they might

standard against which to measure that conduct. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 37 at 206-07 (4th ed. 1971); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 15.3 at 880-83 (1956); James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 *VAND. L. REV.* 697 (1952).

¹⁸ Professor Clark, in his treatise on domestic relations, explains the reluctance of courts to enter support decrees when the parties are living together in this way:

Some cases . . . refuse relief . . . on the theory that the courts should not make decisions for the parties concerning the details of their marital conduct when the marriage is still a going concern Within limits this reluctance is certainly sensible. *The courts can hardly allow themselves to be drawn into deciding whether the family budget will cover the purchase of a car or a television set.*

H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.1 at 186 (1968) (emphasis added) (citations omitted).

¹⁹ Cf. pp. 502-05 *infra*.

²⁰ See H. CLARK, *supra* note 18, §§ 6.1-7 at 181-218.

²¹ *Id.* § 18.5 at 629-36.

²² For example, to obtain support payments from her husband a woman usually must prove that they were married, that they are no longer living together but are not divorced, and that the separation is not due to her own conduct (adultery, desertion, etc.) See H. CLARK, *supra* note 18, §§ 6.1-7 at 181-218. And the rules governing the legal effects of abandonment and neglect of children are even more narrowly circumscribed. *Id.* § 18.5 at 629-36.

²³ I have borrowed the term "polycentric" from Professor Fuller, See Fuller, *supra* notes 2 & 7. It appears that he borrowed the term from Michael Polanyi. See M. POLANYI, *THE LOGIC OF LIBERTY* 170-84 (1951), cited in Fuller, *supra* note 2, at 33 n.26, and Fuller, *supra* note 7, at 3.

usefully be referred to as "planning problems," or "design problems."²⁴ Or finally, returning to the need in adjudication for relatively specific rules of decision, these problems might be described as "requiring the exercise of unlimited discretion on the part of the decisionmaker."

This last way of referring to unadjudicable problems deserves further comment. Much attention has recently been given in law journals to defining "discretion" and to exploring the philosophical implications of its exercise by courts.²⁵ If the term is employed to refer to the power exercised when any solution, or a wide range of solutions, are permitted by the established rules,²⁶ then by definition a court must exercise discretion in attempting to solve a polycentric problem. Obviously, the distinction between decision-by-rule and decision-by-discretion is a matter of degree; the less specific and more general the rule, the greater the need for the exercise of discretion. From this, two important points follow: First, there is probably no such thing as a problem—even a classically legal problem—without a certain amount of open-endedness. Thus, it is inevitable, and no doubt desirable, that to some extent courts exercise discretion in deciding legal problems of even the most formalistic variety.²⁷ What we are concerned with here are problems which tend toward the extreme on the scale of open-ended polycentricity—*i.e.*, cases in which the dominant mode of decision is the exercise of discretion.

And second, even with regard to highly polycentric problems, the point is that adjudication is ill-suited to solving them, not that it is absolutely incapable of doing so. When pressured, courts can react in some fashion or other to the most open-ended problems. The important thing to recognize is that whenever courts yield to such pressures, the parties affected by the decisions are, in proportion to the extent to which the problems are open-ended, denied the opportunity to participate meaningfully in the decision process. Moreover, it must be recognized that this denial of the opportunity to participate strikes at the very heart of the integrity of adjudication. If it recurs routinely, the judicial system itself may be threatened. When asked, cajoled, and finally forced to try to solve unadjudicable problems, courts will inevitably respond in the only

²⁴ For an extended application of these principles to the field of product design liability see Henderson, *supra* note 2.

²⁵ See, e.g., Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Morawetz, *Commentary: The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859 (1973).

²⁶ See Greenawalt, *supra* note 25, at 268.

²⁷ It has been argued philosophically that all rules, however formal, require some "filling in" at the law application stage. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958).

manner possible—they will begin exercising managerial authority and the discretion that goes with it. Attempts will be made to disguise the substitution, to preserve appearances, but the process which evolves should (and no doubt eventually will) be recognized for what it is—not adjudication, but an elaborate, expensive masquerade.

II. EXPANDING THE NEGLIGENCE CONCEPT:

RETREAT FROM THE RULE OF LAW

If I have succeeded in demonstrating the need for relatively specific rules of decision as prerequisites to adjudicability, then my objective in the analysis which follows ought to be fairly obvious to anyone familiar with the developments in tort law in recent years. Gradually, step-by-step, the traditional limitations upon liability in negligence, which gave sufficient specificity to the negligence concept to allow it to be the subject of adjudication, have been eliminated. With increasing frequency, courts have abandoned traditional doctrines and have embraced the idea of a single, unified, most general principle upon which to determine liability. Many torts scholars and commentators have encouraged and praised these developments. I do not. Consistent with the foregoing analysis of the limits of adjudication, I submit that this judicial expansion and purification of the negligence concept has proceeded to the point where courts are beginning routinely to confront the sorts of open-ended, polycentric problems described above. As a consequence, the integrity of the judicial process in these cases is very much threatened. I do not use the word “threatened” lightly. If anything, it understates the level of my concern. If the developments to which I refer continue unchecked, I doubt seriously that our common law system of negligence-based liability will survive to the end of this century.

In the sections which follow, I shall trace the major elements in the expansion of the negligence concept, beginning with an analysis of the ways in which traditional negligence doctrines have allowed courts to cope with potential difficulties and ending with a description of the role of torts scholarship in encouraging the potentially destructive developments of recent years. Before turning to this task, I should like to emphasize that I have no quarrel with judicial law reform,²⁸ as such, nor are my objections to what is happening based upon disagreement with the substantive social goals reflected in recent developments. Instead, my concern is directed at the form these recent reforms have taken—*i.e.*, the particular means chosen to achieve the social objectives—and the

²⁸ See note 5 *supra*.

very real threat to the adjudicative process presented by its being asked to perform tasks which are clearly beyond its capabilities. The simple truth which has escaped attention in recent years is that courts are not capable of solving our society's problems, including problems of risk management, without substantial formal guidance from the law. We torts people will continue to ignore this fact only at our peril.

*A. The Role of Traditional Doctrine in Rendering
the Negligence Concept Adjudicable*

Implicit in the foregoing statements of my thesis is a recognition that judicial implementation of the negligence concept is not necessarily, in and of itself, a bad idea. To be sure, the issue of whether a particular defendant's conduct was "reasonable under the circumstances" is precisely the type of issue which, potentially at least, threatens courts with open-ended, polycentric problems that are beyond their capacity to solve. However, courts have, until the recent acceleration of the expansionary trend referred to above, managed to cope fairly well with the potential difficulties associated with the negligence concept, and have kept the levels of polycentricity in negligence cases within tolerable limits. To better understand the manner in which recent developments and reforms threaten the integrity of the torts process, it is necessary to consider the methods by which, until recently, the negligence concept has been rendered adjudicable.

Two techniques have been developed and used by courts to cope with the potential difficulties posed by the negligence concept. On the one hand, in cases involving the individual conduct of "the man in the street" in his arm's length relations with others in the society, courts have relied heavily upon two institutions which have, as a consequence, come to occupy a centrally important position in this area of the law: the reasonable man test and the lay jury. Given the nontechnical nature of the issues presented in these cases, the moralistic, flesh-and-blood qualities of the reasonable man have provided an adequate vehicle with which to bring a semblance of order to the task of addressing the polycentric question of what modes of conduct individual members of society have a right to expect from one another.²⁹ And the collective jury verdict, reached in secret and rendered without explanation, is ideally suited to disguising and submerging the analytical difficulties encountered in

²⁹ In the terms employed in the present analysis, the litigants and the decision maker, often the jury, conjure up a vehicle for the hypothetical exercise of either managerial authority or contract negotiation. See note 7 *supra* & text accompanying. See generally James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1 (1951).

applying so general a concept as "reasonableness" to the facts of particular cases.³⁰ Admittedly, this combined technique of couching argument in terms of how a hypothetical reasonable person would or would not have acted, and then turning the ultimate question of liability over to a jury, depends for its success upon its ability to hide from view, rather than to confront and solve, the polycentricity in these cases.³¹ Nevertheless, it must be conceded that in the negligence cases in which content is given to the reciprocal duty of reasonable care owed generally by individuals in our society, the difficulties have not proven insurmountable.

However, there are limits to the effectiveness of this sort of judicial sleight of hand. Inevitably, cases arise in which a complicating factor makes it unmanageably awkward to purport to ask how a reasonable person in the defendant's position would or would not have acted. As will be developed in subsequent discussions, these factors fall within three basic categories: (1) the evaluation of a particular defendant's conduct may require an unusually complex, highly technical analysis; (2) the parties may be in a special relationship which must be taken into account by modifying the duties each owes to the other; and (3) practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct. Whatever the complicating factor in a given case, the characteristic common to all is that the technique traditionally employed in cases involving the application of the general duty of reasonable care to arm's length transactions between strangers—*i.e.*, obscuring the analytical difficulties by positing a hypothetical reasonable person and letting the jury decide on the basis of its collective intuition—will not work. The presence of the complicating factor and the explicit recognition that it be taken into account make it much more difficult to hide the reality that the court is being asked to plan social relations on a case-by-case basis. Given the polycentric nature of that planning task, meaningful adversary argument would be difficult,

³⁰ The survival of the jury in negligence cases undoubtedly reflects satisfaction with the input of laymen's intuition in the decision process. See generally Allen, *Learned and Unlearned Reason*, 36 JURID. REV. 254 (1924); Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

³¹ The fact that legal standards tend to be thought of as minimum standards probably helps to reduce the open-endedness of the negligence issue somewhat. But as long as implementation of the negligence concept requires the balancing of the utility and risk associated with defendant's conduct under all the circumstances of each particular case (see *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)), the issue retains sufficient polycentricity to necessitate such judicial sleight of hand.

if not impossible; and the reliance interests typically at stake are too important to be left to decision by intuition, or by whim.³²

Therefore, courts have traditionally employed a different technique in this second category of negligence cases. Unable and unwilling to hide the open-endedness procedurally, courts have sought to avoid it substantively by introducing sufficient specificity into the rules governing liability to render the cases adjudicable. Thus, the issue for decision is not whether the defendant's conduct was reasonable under all the circumstances, but whether the requirements of relatively specific, formal rules of decision are satisfied. These rules share the functional characteristic of all common-law rules of liability—that of screening out polycentricity and rendering legal controversies adjudicable.

Although we will be exploring them in greater detail in the next section, it will be helpful to consider briefly a few concrete examples of the ways in which courts have modified the negligence concept to render it adjudicable. Perhaps the best example of a case recognized by courts from the beginning to involve potentially threatening levels of polycentricity is that involving the alleged negligence of a physician rendering treatment. Clearly, the question of whether or not a particular mode of medical treatment meets the general requirement of reasonable care presents a technically complex, open-ended, and unadjudicable planning problem. Equally clearly, the difficulties could not successfully be obscured by positing a "reasonably prudent doctor" and asking the members of the jury to negotiate or intuit their way to a sensible result. Therefore, courts have adopted a rule of liability which eliminates the potential open-endedness in malpractice cases by providing a great deal of specificity. Traditionally, defendant doctors have not been judged on the basis of whether their conduct was "unreasonable," or "inconsistent with the interests of society," but on the basis of whether their treatment failed to conform to the recognized custom of their profession.³³ Thus, the open-ended task of planning reasonable medical care is not attempted in court, but is delegated to the collective managerial authority of the medical profession.

³² Admittedly, this point about the importance of the reliance interests detracts somewhat from the neutrality of my position that denial of the litigants' right to participate is, in and of itself, an unjustifiable perversion of the judicial process. However, I raise it here because it helps to underscore the practical, as well as the theoretical, implications of my thesis to torts lawyers and scholars. If the integrity of adjudication is routinely compromised, those adversely affected will undoubtedly move to replace it with some more honest and efficient mode of resolving disputes.

³³ See note 68 *infra* & text accompanying. Cf. the earlier discussion of the possible use of custom as a means of rendering the "family vacation" dispute adjudicable. See note 11 *supra*.

The clearest example of a formal modification of the general duty of reasonable care being prompted by a special relationship between the parties, in the absence of technical complexity, is the traditional judicial reaction to negligence actions brought by one close family member against another. For example, when a young child brings an action against his parents alleging them to have negligently caused him harm in the course of their exercising parental supervision, the court is confronted with the necessity of weighing the special factor of the parties' relationship in reaching a decision. To be sure, if the court were willing to treat the case as one involving the arm's length interaction of strangers, no particular problem would be presented. But given the parent-child relationship, no such willingness can be expected. In effect, the court is being asked to adjudicate a solution to the problem of what sort of behavior can properly be demanded of parents who must balance the physical well-being of their children against the concomitant need to exert discipline and encourage development. Not surprisingly, courts have traditionally refused to address such a polycentric issue in the course of implementing the negligence concept. However, in contrast to the technique employed in the medical malpractice cases, in intrafamily negligence actions courts have simply refused altogether to attempt to adjudicate solutions to these problems of intrafamily responsibilities—parents have traditionally been granted immunity from liability to their minor children for allegedly negligent conduct.³⁴ In this way, by adopting a specific rule of decision immunizing parents from negligence-based liability to their children, the task of planning reasonable parental supervision is not attempted in court, but instead is delegated to the managerial authority of individual parents.

These examples of how courts have traditionally avoided the threats of open-endedness in implementing the negligence concept are illustrative only. We shall return to examine them more closely, together with examples of courts placing limits upon the extent of potential liability, in the following section. What I have sought to accomplish thus far is to present an overview of the law of negligence as it existed prior to the recent developments of concern in this article, and to suggest that much of the formal content of traditional negligence law is as explainable in terms of the necessity of courts avoiding polycentric problems as it is explainable in terms of the desirability of courts furthering the substantive objectives of society. Obviously, judicial avoidance of polycentricity is not the *only* explanation for the parameters of traditional

³⁴ See note 114 *infra* & text accompanying.

negligence law—presumably, these limitations upon the general negligence concept—*e.g.*, the rules governing the liability of doctors to their patients and parents to their children—would not have been adopted if they had not been perceived by courts to further the interests of society in regulating, and often encouraging, the types of conduct to which they are applied. But I submit that the relative formality of those exceptions was dictated to no less extent by the necessity to avoid trying to adjudicate answers on a case by case basis to questions such as “How should doctors practice medicine?” and “How should parents handle their children?” Consistent with the earlier analysis of the limits of adjudication, courts were required to adopt formal exceptions to, and modifications of, the general duty of reasonable care in order to render manageable the negligence concept in a broad range of cases in which the unadjudicability of the issues presented could not be hidden by procedural sleight of hand.

To be sure, not all traditional negligence doctrines serve the function of insulating courts from the potentially destructive open-endedness of helping to plan a rational society in the context of case-by-case adjudication of torts disputes. The rule of charitable immunity,³⁵ for example, would appear to serve entirely the substantive objective of subsidizing the activities of charitable organizations—there is no technological complexity, special relationship, or need to establish practical limits upon potential liability which differentiates conduct on behalf of charity from other types of conduct.³⁶ But the charitable immunity rule is unique in this respect. Behind most, if not all, of the other traditional limitations upon the general negligence concept lurk problems of social planning whose potential open-endedness would seriously threaten the integrity of the judicial process had those limitations, or others of equal formality, not been recognized. In the following section we will examine some of the more significant case law reforms by which traditional negligence doctrines are being abandoned, and explore in greater detail the implications of these developments to the continued vitality of the common law torts process.

B. Recent Case Law Developments

Before proceeding to explore the major case law developments of recent years, it will be worthwhile to reflect momentarily upon the reasons

³⁵ See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 133 at 992-96 (4th ed. 1971).

³⁶ It must be recognized that conduct on behalf of charity may pose a greater than normal incidence of potential difficulties because it tends coincidentally to involve the delivery of medical services (*see pp. 491-95*), or governmental functions (*see pp. 505-10 infra*).

for these fundamental changes. Obviously, they reflect a shift in social and judicial attitudes regarding the proper objectives to be served by our liability system. If, as some have argued, one of the increasingly dominant social objectives of our negligence system is compensating the victims of accidents,³⁷ it is probably inevitable that the traditional formal exceptions, the substantive effects of which were to deny recovery in a range of cases to liability in negligence, would eventually come to be viewed as unjustifiable, antisocial denials of the right of injured plaintiffs. At the same time, these expansions of negligence-based liability undoubtedly reflect an erosion of confidence in the extrajudicial institutions and processes to which responsibility for decisions affecting safety was delegated under traditional tort doctrines.³⁸ Finally, it must be recognized that these recent developments in the law of negligence reflect what could be termed an "aesthetic principle" in favor of purification of legal doctrine for its own sake.³⁹ Formality in the law implies sacrifice, and is therefore repugnant to the romantic commitment to "justice in every case" currently in vogue among torts scholars.⁴⁰

Of course, I am not primarily concerned with the social policy objectives underlying these recent developments, but rather with the extent

³⁷ The foremost proponent of this theory of compensation has been Professor Fleming James. His seminal article advancing the thesis, upon which was based much of what followed, was *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549 (1948). Perhaps his clearest statement of the compensation principle appears in *Indemnification, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 *N.A.C.C.A.L.J.* 360-61 (1958).

³⁸ Cf. note 69 *infra* & text accompanying.

³⁹ See generally Cooperrider, *A Comment on The Law of Torts*, 56 *MICH. L. REV.* 1291, 1309-10 (1958).

⁴⁰ That this represents the overwhelming bias of torts commentary today should be obvious to anyone familiar with torts scholarship in recent years. I shall try to document it at relevant points throughout my analysis. For the present, two brief but typical samples will suffice. Having rejected the desirability of formal, statutory rules of decision for environmental disputes, the author of a recent article continues:

What we find when we look at "environmental law," therefore, is a balancing of competing interests

. . . . The judiciary is the only branch of government capable of this case-by-case balancing procedure, and thus it is within this branch that any solution to the problems of environmental law must be based.

Smith, *The Environment and the Judiciary: A Need for Co-operation or Reform?*, 3 *ENV. AFFAIRS* 627, 638-39 (1974). And a similar abhorrence for rigid formality prompted the author of a recent article espousing a case-by-case treatment of fright without impact cases to conclude:

[It has been argued that] to permit others than the one imperilled to recover for nervous shock or mental distress would open up a Pandora's box of litigation

This cry has been raised against every innovation in tort litigation. It is an insult to the whole judicial process dedicated as it is to the winnowing of true claims from false ones.

Stone, *Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 *TUL. L. REV.* 782, 791 (1974).

to which they threaten the integrity of the adjudicative process. It will be recalled that the negligence concept poses serious difficulties for courts in three basic situations: (1) where an evaluation of the defendant's conduct requires an assessment of complex technology; (2) where an evaluation of the defendant's conduct requires defining the contours of special relationships; and (3) where practical limits must be placed upon the extent of potential liability. In the sections which follow, I shall offer several examples of recent reforms in each of these categories. It should be borne in mind that these developments have received widespread attention from torts scholars and have been the subject of considerable commentary. Therefore, I shall avoid the duplication of effort involved in exhaustively tracing these reforms step by step from their inception. Instead, I shall assume a basic familiarity with the subject areas to be examined, and direct my efforts toward accomplishing a shift in perspective that will enable the reader to view familiar things in a new and different way.

1. Where Evaluation of the Defendant's Conduct Requires an Assessment of Complex Technology

These are by far the most dramatic examples of the kinds of difficulties courts encounter when they try to adjudicate solutions to open-ended, polycentric planning problems. No other areas of tort law today pose more serious threats to the integrity of the judicial process than those which follow in this section.

a. Products Liability

It is appropriate to begin our exploration of recent developments here, because a famous products liability decision marked the beginning of the trend towards expanding and purifying the negligence concept. The decision to which I refer is *MacPherson v. Buick Co.*,⁴¹ in which the New York Court of Appeals removed the requirement of privity of contract in a negligence action brought against the remote manufacturer by the injured purchaser of a flawed automobile. Whatever may be said for the social policy objectives supporting the requirement of privity at its inception,⁴² from the process perspective the privity rule served

⁴¹ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁴² See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 96 at 641-42 (4th ed. 1971). Lord Abinger, in the English decision generally recognized as the source of the privity rule, emphasized the spectre of limitless liability: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I see no limit, would ensue." *Winterbottom v. Wright*, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (Ex. 1842).

the vital function of insulating courts from the necessity of trying to adjudicate, on a case-by-case basis, answers to the highly polycentric question, "How much quality control should a reasonable manufacturer insist upon?"⁴³ To be sure, as the underlying views of policy shifted increasingly in favor of protecting consumers during the period preceding *MacPherson*, the privity rule had become subject to exceptions in a number of cases.⁴⁴ However, the significant characteristic of these exceptions for present purposes was their relative formality—the major issue in a products liability case during that period was not how much quality control was reasonable, but whether or not the product in question fell within one or another of the developing subcategories of exceptions to the privity rule.⁴⁵

When then Judge Cardozo in *MacPherson* removed the privity rule as an illogical and ill-conceived barrier to product manufacturers' liability in negligence, he embarked the courts of this country upon a course of expanding and purifying the law of negligence which continues to this day. Because industry custom was deemed unacceptable as the standard against which to judge a defendant's efforts at quality control,⁴⁶ the period following *MacPherson* was characterized by substantial analytical difficulties in implementing the negligence concept in products liability cases.⁴⁷ Thus, it was inevitable that the courts would be pres-

⁴³ In theory, the plaintiff in a negligence action involving a flawed product would be required to show that the defendant's quality control efforts were unreasonable, and therefore negligent. The privity rule prevented that issue from being presented.

⁴⁴ The exceptions, which began with *Thomas v. Winchester*, 6 N.Y. 397 (1852), are reviewed and analyzed in then Judge Cardozo's majority opinion in *MacPherson*.

⁴⁵ The basis for the exception—i.e., whether a particular product was, as a matter of law, "imminently dangerous to the lives of others"—served to render more manageable the issue of the reasonableness of defendants' conduct in these cases. If the court concluded that the product before it was not "imminently dangerous," the issue of the reasonableness of the remote seller's conduct was never reached; and in those cases in which an exception was made, the same facts which supported the exception tended, because they indicated extreme risk, to render manageable the question of liability. Of course, the issue of whether the product fell within the exception posed difficulties, which eventually led to its demise in *MacPherson*. But I submit that for a time, at least, the "general immunity subject to relatively specific exceptions" approach did function to render flaw cases more manageable than would have been the case under a general negligence standard in the absence of the privity rule.

⁴⁶ See, e.g., *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

⁴⁷ It is beyond the scope of this article to chronicle these difficulties in any detail. Basically, they sprang from the necessity of both sides being required in proof and argument to address the question of the reasonableness of the corporate defendant's efforts at quality control. Inevitably, courts began permitting plaintiffs to show negligence circumstantially, via application of the *res ipsa loquitur* doctrine, to the point that courts were implementing a thinly-veiled strict liability system. This helped to solve the problems of proof and argument regarding the issue of defendants' negligence, but created analytical problems of its own. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d

sured institutionally to abandon the futile effort to decide these cases on so open-ended a basis as "reasonable care." Happily, the mounting social pressures in favor of greater consumer protection coincided with this institutional imperative, and in an astonishingly short time the courts effectively replaced negligence with privity-free strict liability in tort as the basis for manufacturers' liability for harm caused by flawed products.⁴⁸

Nothing more clearly reflects the neutrality of the process principles herein advanced than the developments just described. Although the rule of strict manufacturers' liability is at the opposite end of the social policy spectrum from the strict immunity afforded manufacturers by the privity rule, both share the important feature of insulating courts from polycentric problems. From the present perspective of the limits of adjudication, the system is blind to the politics of whether plaintiffs win or lose in these cases. However, what cannot be ignored from this perspective is the imperative that courts avoid trying to decide cases involving flawed consumer products on so vague a standard as the "reasonableness of the defendant's conduct under all the circumstances." Thus, instead of allowing the negligence concept to flower to maturity by freeing it from irrational impediments, *MacPherson* actually doomed the negligence concept in products liability cases involving flawed consumer products by exposing courts to problems which they could not solve.⁴⁹

Of course, the development of strict liability in cases involving flawed products is, in a manner of speaking, a "success story." To be sure, the law of negligence could not cope with the aftermath of *MacPherson*; but the more manageable concept of strict liability was quickly

436 (1944). For a description of the lines of development of circumstantial proof in these cases, see Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963). Both Keeton and Prosser (the latter, in his famous pair of articles on the subject—see note 50 *infra*) suggest that, given these developments, juries had no difficulty in most cases with the issue of reasonable care. However, their conclusion is consistent with my thesis, in that juries (with the tacit approval of judges) had simply converted the negligence system into one of strict liability. In principle, however, such a masquerade must be condemned as lawless, in that juries were still free, in theory, to return verdicts for defendants. Cf. note 81 *infra* & text accompanying. See also *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 543, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

⁴⁸ See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) and *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

⁴⁹ Of course, I do not intend to disclaim the important role of substantive social policies in this process of reform. For a thoughtful survey of the various public policy bases for strict products liability see McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970). If I tend to emphasize the role of process in these developments, it is because this aspect has so long been overlooked.

developed to take its place. Unfortunately, this happy ending may be unique to products cases involving manufacturers' liability for harm caused by flaws. In the other great area of products liability, involving products that are dangerous because of the manner in which they are designed and marketed, the relative reasonableness of the risks presented appears to be the only socially acceptable basis upon which to determine liability.⁵⁰ Therefore, given the social imperative that liability for product design and marketing be determined on the basis of reasonableness, courts have been compelled to develop traditional limitations upon and modifications of the negligence concept as a means of avoiding process difficulties. For example, courts have traditionally insisted upon full disclosure of hidden risks in implementing the failure to warn doctrine, thereby avoiding the necessity of asking whether a given manufacturer might justify nondisclosure on a "best interests of society" basis.⁵¹

⁵⁰ Absolute manufacturers' liability for risks of harm associated with product designs has been rejected unanimously, *see* Henderson, *supra* note 2, at 1554, together with the adoption of industry custom as the standard against which to measure defendant's responsibilities, *id.* at 1556-57. Traditionally, product designs and the marketing thereof must be found to be unreasonably dangerous before liability will be imposed. *See, e.g.,* Colosimo v. May Dept. Store Co., 466 F.2d 1234 (3d Cir. 1972). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, comment *i*. (1965). To be sure, a growing number of courts appear to be rejecting the "unreasonably dangerous" limitation in § 402A. *See, e.g.,* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973). For a collection of recent cases *see* Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 DEPAUL L. REV. 914, 931 n.68 (1975). However, it is clear from these cases that the courts are not moving to absolute liability for design risks, and will continue to implement some form or other of reasonableness as the basis of manufacturers' liability for allegedly defective design. *Cf.* notes 61-64 *infra* & text accompanying.

A possible alternative to "reasonableness" as the standard against which to measure defectiveness might be "consumer expectations." This appears to have been a standard adopted in *Heaton v. Ford Motor Co.*, 248 Ore. 467, 435 P.2d 806 (1967): "[Products] should be strong enough to perform as the ordinary consumer expects." 248 Ore. at 474, 435 P.2d at 809. However, in almost every instance the concept of expectations is employed as one of "reasonable" expectations, and thus becomes merely another way of phrasing the basic test of reasonableness. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 402A, comments *g* & *i* (1965).

⁵¹ In *Larson v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the court stated the full-disclosure principle as follows:

If, because of the alleged undisclosed defect in design of the 1963 Corvair steering assembly, an extra hazard is created over and above the normal hazard, General Motors should be liable for this unreasonable hazard. Admittedly, it would not sell many cars of this particular model if its sales "pitch" included the cautionary statement that the user is subjected to an extra hazard or unreasonable risk in the event of a head-on collision. But the duty of reasonable care should command a warning of this latent defect that could under certain circumstances accentuate the possibility of severe injury.

Id. at 505-06. *See generally* Henderson, *supra* note 2, at 1558-62. Two recent decisions appear to have flirted with the idea of allowing a "nondisclosure benefits society" argument on behalf of defendants. *See* Reyes v. Wyeth Labs., Inc., 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974) and Davis v. Wyeth Labs., Inc., 399 F.2d 121 (9th Cir. 1968). However, these were unusual cases on their facts (drugs distributed by health offi-

Moreover, courts have adopted a number of formal limitations upon liability for unsafe design, including the patent danger rule,⁵² the intended purpose doctrine,⁵³ and the bystander rule.⁵⁴ As has been pointed out in previous discussions, the most important function served by these formal limitations from our present perspective is *not* that of furthering the fortunes of products manufacturers, but rather of insulating the courts from problems which would otherwise threaten to engulf them in a morass of social planning. With these doctrinal limitations, courts have managed to cope with the potential difficulties in cases involving product design and marketing by delegating major responsibility for decisions regarding product design safety to the give-and-take negotiations of the marketplace,⁵⁵ without such limitations, faced with the necessity on a case by case basis of adjudicating answers to the question "How much design safety is enough?", the courts would confront chaos.

Unfortunately, chaos may be upon us. The source of the difficulties should, by now, be obvious. The same social policy pressures favoring consumer protection which earlier pressured courts to adopt strict liability for flaw-caused harm are now pressuring courts to abandon the traditional limitations upon negligence-based liability for dangerous product design and marketing. Step by step, the negligence principle governing liability for dangerous product design is being expanded and purified, and courts are beginning routinely to address the problem of reasonable product design armed with no more specific guide to decision

cials during mass immunization program), and the actual holdings are consistent with the full disclosure position. Cf. note 74 *infra* & text accompanying.

⁵² The leading case supporting the rule that there is no liability for injuries caused by an obviously dangerous condition is *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950). See also *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769 (1973). See generally *Marschall, An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. Rev. 1065 (1973).

⁵³ The rule is that manufacturers are not liable for harm resulting from unintended use of their products. See, e.g., *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *Winnett v. Winnett*, 57 Ill. 2d 7, 310 N.E.2d 1 (1974).

⁵⁴ The rule that prevented bystanders (*i.e.*, persons other than users and consumers of the product) from recovering originated in flaw cases. See, e.g., *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966); *Hahn v. Ford Motor Co.*, 256 Iowa 27, 126 N.W.2d 350 (1964); *Rodriguez v. Shell's; City, Inc.*, 141 So. 2d 590 (Fla. App. 1962). See generally *Noel, Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970). Cf. RESTATEMENT (SECOND) OF TORTS § 402A comment *o* (1965). The importance of the bystander rule in design cases inheres in the fact that bystanders are among the most sympathetic class of plaintiffs from a policy standpoint. Therefore, had the rule not been recognized, bystanders would have placed severe pressures upon courts to address the issue of reasonable design. See *Henderson, supra* note 2, at 1567, 1573.

⁵⁵ To some extent, design decisions are reached by manufacturers' exercise of managerial authority. For doubts concerning the adequacy of marketplace negotiations as a protection of consumer interests see FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY 63-72 (1970).

than "what is in the best interests of society."⁵⁶ To be sure, not all jurisdictions have joined in this trend,⁵⁷ and there are reasons for believing that it may not be irreversible.⁵⁸ But courts have already abandoned enough in the way of traditional doctrine,⁵⁹ and sufficient numbers of torts writers have praised and encouraged these developments,⁶⁰ to give rise to the concerns which have prompted the present analysis.

The real difficulty in these product design cases, which distinguishes them from cases involving product flaws, is the unavailability of a workable, relatively mechanical definition of "defect." Unlike the flaw cases, in which the question of whether a particular product was flawed is not

⁵⁶ The cases are collected in Henderson, *supra* note 2, at 1565-66 nn.145-47. A recent count of jurisdictions on the important question of unreasonable automobile design will be found in *Fredricks v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966), *aff'd* 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968). That the guide to decision suggested in the text is the true basis of liability in these cases is reflected in the following formulation in one of the leading design liability cases, *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 476, 467 P.2d 229, 237, 85 Cal. Rptr. 629, 637 (1970): "Whether the [product] was unreasonably dangerous due to faulty design . . . is clearly a question of fact to be determined by the jury." *Cf.* note 50 *supra*.

⁵⁷ The cases are collected in Henderson, *supra* note 2, at 1561-62 nn.123, 124, 126-29. See also *Fredricks v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966), *aff'd* 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

⁵⁸ I have in mind decisions such as *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974), and *Mieher v. Brown*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973), in which the courts recognized in principle the existence of a common-law duty to adhere to a general standard of reasonableness in auto design, yet denied liability as a matter of law. See J. HENDERSON, JR. & R. PEARSON, *THE TORTS PROCESS* 648-49 (1975). It may be possible, in time, for more specific rules of decision to be developed with which to cope with the potential difficulties in these product design cases. If this common-law process of rule development should take place, then the present period of difficulties may be viewed as temporary.

⁵⁹ Thus, the patent danger rule has been thrown over in *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); the intended purpose rule has been abandoned in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); and the bystander rule has been scuttled in *Elmore v. American Motors*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

⁶⁰ Regarding the demise of the patent danger rule see, e.g., Marshall, *supra* note 52; Comment, *The Open and Obvious Nature of a Design Defect Does Not Necessarily Preclude Manufacturer's Liability*, 49 TEXAS L. REV. 591 (1971); Comment, *Strict Liability in Tort Based on Defective Design*, 1970 WASH. L.Q. 359. Regarding the demise of the intended purpose doctrine in the important field of automobile design, see, e.g., Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967); Note, *Liability for Negligent Automobile Design*, 52 IOWA L. REV. 953 (1967); Note, *Automobile Design Liability: Larsen v. General Motors and Its Aftermath*, 118 U. PA. L. REV. 299 (1969); Note, *Products Liability—Duty of Care in Automobile Design—Fitness for Collision*, 21 S.C.L. REV. 451 (1969). And regarding the demise of the bystander rule, see, e.g., Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970); Note, *Torts—Strict Liability: Protection for the Bystander in Products Cases*, 26 ARK. L. REV. 106 (1972); Note, *Strict Products Liability to the Bystander: A Study in Common Law Determination*, 38 U. CHI. L. REV. 625 (1971); Comment, *The Bystander's Liberation Front—U.C.C. § 2-318 or Strict Liability?*, 19 U. KAN. L. REV. 251 (1971).

particularly open-ended or analytically troublesome,⁶¹ design cases require the courts to apply the core concept of "reasonableness under all the circumstances" in determining whether any given product design is defective.⁶² Whether or not the courts admit that they are deciding these cases on negligence principles,⁶³ that is essentially what they are doing.⁶⁴ Efforts are made to obscure the analytical difficulties of such a task. Typically, expert witnesses are called by both sides to elaborate extensively, but in essentially conclusory terms, upon how and why a particular product design is or is not defective.⁶⁵ But in the end, given the impossibly open-ended task they are asked to perform, triers of fact are left to reach their decisions by collective intuition, or emotion, or whim.

Thus, unable to seek refuge in a rule of strict liability, and increasingly unable to hide the lack of principle in these cases behind the traditional smokescreens of conclusory expert testimony and general jury verdicts, courts are floundering. To be sure, more and more injured plaintiffs are recovering higher and higher judgments, and most torts writers on the subject have encouraged and praised the developments of which I speak. But the costs in terms of sacrifices of judicial integrity of achieving these political objectives must be, and are, enormous. No sensitive student of the legal process can observe the trial of a product

⁶¹ The proof of defect in these cases may be very complex and difficult, but the availability of a built-in, specific standard—i.e., the product design and its intended purpose—against which to measure the individual product all but eliminates open-endedness and polycentricity.

⁶² Where the design itself is attacked as defective, there is no built-in standard against which to judge the product. Instead, the courts must measure the defendant's design against some hypothetical standard of reasonableness. Cf. Henderson, *supra* note 2, at 1547.

⁶³ The cases which represent the clearest repudiation of the applicability of negligence concepts are those which have refused to include the "unreasonably dangerous" language in their versions of RESTATEMENT (SECOND) OF TORTS § 402A. See, e.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). The cases following Cronin are collected in Kiely, *The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's The Common Law Tradition*, 24 DE PAUL L. REV. 914, 931 n.68 (1975).

⁶⁴ For a recent survey of the literature on this point, together with the conclusion that "looked at from the practical trial level of what must be *done*, the plaintiff must prove a negligence case," see Kiely, *supra* note 63, at 929 n.58 & text accompanying.

⁶⁵ I have described these efforts in some detail in Henderson, *supra* note 2, at 1558, 1569-71. Cf. Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEXAS L. REV. 1303 (1974); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQUESNE L. REV. 425 (1974). Although these authors disagree with me regarding the root cause of the difficulties being encountered at trial in these product design cases, they agree with the accuracy of my description of what is going on. See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

design liability case conducted on such a basis without becoming sickened at heart.⁶⁶

b. Medical Malpractice

I shall begin my analysis of recent developments in the medical malpractice field by disclaiming any intent to argue here that the so-called "malpractice crisis" is a direct consequence of the expansion and purification of the negligence concept in medical malpractice cases. I do submit that some, at least, of the recent modifications of the negligence concept in malpractice cases constitute no less a retreat from the rule of law than similar modifications in cases involving manufacturers' liability for unsafe product designs; and that such abandonments of principle, should they continue, will exacerbate the adverse conditions which may have produced a crisis in the first place. But I have insufficient data upon which to conclude that the developments which I shall examine here are a substantial cause of the predicament in which doctors currently find themselves.⁶⁷ One reason for my hesitation in this regard is the fact that judicial expansion and purification of the negligence concept in medical malpractice cases is far less advanced than analogous developments in the other areas under consideration in this section. In the fields of products liability and environmental protection, for example, one can demonstrate a pronounced trend in the direction of liberalizing and expanding the conceptual bases of liability. In the medical malpractice field, in contrast, the developments are far less advanced. Perhaps because of a tacit judicial recognition of the growing crisis to which reference has been made, courts have not as yet succumbed in significant numbers to the temptation of trying independently to adjudicate answers to the question "What constitutes reasonable medical care?"

⁶⁶ I am not completely alone in my assessment of the breakdown of integrity in some of the recent product design liability cases. See, e.g., Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQUESNE L. REV. 425 (1974); Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEXAS L. REV. 1303 (1974). Although these authors and I are in substantial disagreement regarding the source of the difficulties in these cases (see Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976) and Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976)), we agree that such breakdowns are occurring.

⁶⁷ Indeed, it is unnecessary for present purposes to assume that a "crisis" exists. If a crisis does exist, it is probably caused by factors other than the increasing willingness of courts to face polycentric problems. These factors may include a decrease in the public trust and confidence in doctors; a growing claims consciousness of the part of everyone in society, including medical patients; and significant increases in the quantity of doctor-patient contacts over recent years. See generally Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528, 537-38 nn. 50-53 & text accompanying, *infra*.

As was suggested in an earlier introductory section, the major technique by which courts traditionally have avoided polycentric problems in the medical malpractice area has been the judicial adoption of the custom of the profession as the standard against which to judge the conduct of individual doctors. Instead of asking whether the medical treatment given by a particular defendant was reasonable under all the circumstances, courts have asked the far less open-ended, and therefore more manageable, question of whether the defendant's conduct conformed to the customary standards of his profession.⁶⁸ Although explanations for this position have traditionally stressed such factors as the need to encourage doctors in the free exercise of their best judgment⁶⁹ and the reality that jurors are not technically competent to understand complicated medical techniques,⁷⁰ I submit that the institutional imperative of avoiding polycentric problems is no less a factor supporting traditional judicial reliance upon professional custom in medical malpractice cases.

Interestingly, many of the recent judicial reforms which have increased doctors' exposure to malpractice liability have not, to any significant extent, exposed courts to the open-ended problems of principal concern here. For example, the abandonment in recent years of the rule which measured a doctor's conduct by the professional custom in his locality has not, at least in theory, exposed courts to polycentric problems due to the fact that courts have continued to look to the custom of a wider medical community for the specific standards upon which to determine liability.⁷¹ Similarly, the willingness of some courts to expand doctors' liability in contract, based upon promises to cure, does not in theory threaten judicial integrity because the formal requirements of contract law presumably must be satisfied in such cases.⁷² And the same conclusion may be reached regarding the recent extensions of liability for failing to inform patients of the risks of submitting to treatment. Although some jurisdictions have refused to give effect to medical custom in deciding the issue of informed consent,⁷³ they have adopted a

⁶⁸ See generally McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 558-69 (1959).

⁶⁹ *Id.*

⁷⁰ *Id.* at 607-08.

⁷¹ For a thorough treatment of the traditional locality rule see *id.* at 569-75. Decisions abandoning the locality rule include *Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968) and *Shier v. Freedman*, 58 Wis. 2d 269, 206 N.W.2d 166 (1973).

⁷² See, e.g., *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971).

⁷³ For treatments of the traditional use of custom in cases involving informed consent, see Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639 (1968); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970). The leading decision abandoning reliance upon custom in such cases is *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

rule of full disclosure which serves equally well in theory to eliminate the issue of whether a particular doctor's failure to inform his patient of a material risk was reasonable under all of the circumstances.⁷⁴

Of course, thus far we have spoken of the theoretical effects of these developments. Is it possible that, as a matter of practical reality, these reforms in the rules governing malpractice liability are exposing courts to open-ended problems beyond their capacity to solve? A satisfactory answer here is difficult in the absence of more definite data. For example, it is possible that the shift from "custom of the local medical community" to "custom of the national medical community" might produce greater uncertainty regarding the content of the applicable standard, and thus might present the practical necessity of the court deciding which, among competing standards, was the more reasonable. And it is equally possible that courts, in implementing a more plaintiff-oriented approach to the issues of contract to cure and disclosure of risks, might allow juries to read promises into contracts where none existed⁷⁵ and to find failures to disclose where none occurred. But in the absence of data showing this to be occurring routinely, I am willing to assume that these developments do not substantially threaten the integrity of the judicial process.⁷⁶

⁷⁴ The full disclosure rule imposed in these malpractice cases is very analogous to the full disclosure rule in products liability-warning cases. See note 51 *supra* & text accompanying. The standard for disclosure in malpractice cases was described in *Canterbury v. Spence* as follows:

In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communication to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: *all risks potentially affecting the decision must be unmasked*. (Emphasis added.)

464 F.2d at 786-87. Thus, the test is not whether a failure to inform was reasonable, but whether such a failure in fact occurred. To be sure, the issue of "materiality to the patient's decision" will require the exercise of judgment by courts in these cases, but it will be decided along a single value axis—"the patient's right of self-decision"—rather than the cluster of value axes presented by any test such as "the good of society." Cf. *Reyes v. Wyeth Labs, Inc.*, 498 F.2d 1264 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); *Davis v. Wyeth Labs, Inc.*, 399 F.2d 121 (9th Cir. 1968). Thus, although the failure to inform issue may be difficult in close cases, it will not be unmanageably polycentric.

⁷⁵ For a criticism of recent developments on this ground, see generally Tierney, *Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457 (1973); Note, *Express Contracts to Cure: The Nature of Contractual Malpractice*, 50 IND. L.J. 361 (1975).

⁷⁶ That is, I am willing to assume that the courts are adhering to the rules of decision as they exist. If the present inquiry were to be opened up generally to the sorts of breakdowns-in-application suggested here, no area of tort law—or law, in general—would be immune from scrutiny. In the interests of keeping the present analysis manageable, I have chosen to focus attention almost exclusively upon the threat to judicial integrity inhering in lack of rule formalism.

A more serious threat to judicial integrity is posed by the recent expansion in several jurisdictions of the *res ipsa loquitur* doctrine in medical malpractice cases. Courts in a few states have held that the plaintiff may reach the jury upon proof that he has suffered a rare adverse result from treatment, notwithstanding uncontroverted proof that the defendant doctor conformed to the customary standards of his profession.⁷⁷ To be sure, the issue for decision in such a case remains the same, at least theoretically—*i.e.*, whether the defendant conformed to the standard of the medical community.⁷⁸ But the giving of that issue to the jury in the absence of any evidence of failure to conform other than the fact of the adverse consequence would seem to countenance decisions by whim in such cases.⁷⁹

The clearest threat to the integrity of the judicial process in the medical malpractice field is posed by the decision of the Supreme Court of Washington in *Helling v. Carey*,⁸⁰ in which the court held as a matter of law that the professional custom to which the defendant doctors clearly conformed was unreasonable. The source of the threat is clear: in allowing independent judicial review of medical custom, the Washington Supreme Court appears to have committed the courts of that state to an active role in the planning and development of medical treatment, a task beyond the capacity of any court system honestly and rationally to perform. Although the holding in *Helling* may be limited to its special facts,⁸¹ and although commentators have expressed doubts regarding its acceptance in the future,⁸² the decision is significant when viewed from our present perspective. That even a single high court could have been persuaded to abandon the security and self-protection of the rule of professional custom reveals the pervasiveness of the current movement towards expansion and purification of the negligence concept. If *Helling* should turn out to have initiated a trend in the

⁷⁷ See, e.g., *Cline v. Lund*, 31 Cal. App. 3d 755, 107 Cal. Rptr. 629 (1973).

⁷⁸ In *Cline v. Lund*, the court discusses the admissibility of testimony from a medical pathologist in a way which makes clear that the defendant doctor would be held to the "proper and requisite degree of skill and care used by practicing physicians in the community." *Id.* at 766, 107 Cal. Rptr. at 637.

⁷⁹ One observer, in an article on the *res ipsa loquitur* doctrine as it is applied in California medical malpractice cases, came very close to this conclusion when he criticized what he termed the "misuse" of the doctrine on what I interpret as a "jury's whim" basis: "The jury, which is not unnaturally sympathetic to the plight of the plaintiff, is the final arbiter." Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043, 1057 (1962).

⁸⁰ 83 Wash. 2d 514, 519 P.2d 981 (1974).

⁸¹ The opinion in *Helling* suggests the holding is so limited. See 83 Wash. 2d at 517, 519 P.2d at 982, 983.

⁸² See, e.g., Bradford, *A Unique Decision*, 2 J. MED. 52 (May 1974); Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528 (1976), *infra*. But see Comment, *The Role of Custom in Medical Malpractice Litigation*, 55 B.U.L. REV. 647 (1975).

medical malpractice field, it will be a development which torts lawyers will one day come to regret.⁸³

c. Environmental Protection

Traditionally, of course, the legal formalities which protected courts from being required to decide how much can reasonably be expected in the way of environmental quality were not part of the law of negligence at all. Thus, until fairly recently, the rules governing trespass on land were more relevant in legal controversies affecting the environment than was the concept of reasonable care which plays a central role in the law of negligence; and the tort doctrines most relevant to environmental controversies—public and private nuisance—were sufficiently distinct unto themselves to resist being treated as theories of negligence-based liability. And yet, the inclusion of the present topic in this analysis of the expansion of negligence is justified—indeed, compelled—by three factors: (1) from our present process perspective, the formal limitations traditionally placed upon liability in trespass and nuisance served precisely the same basic function as did the formal limitations upon negligence-based liability; (2) the recent reforms and expansions of legal doctrine in the environmental protection field have increasingly relied upon the basic negligence concept of “reasonableness under all the circumstances” as a means of achieving independent judicial review and supervision of a wide range of environment-threatening conduct, and (3) no other field of tort law today provides clearer examples of how the abandonment of traditional formalities (whatever their content doctrinally) exposes courts to unmanageable, unadjudicable problems.

That the doctrines of trespass and nuisance were, indeed, formal and circumscribed by “depolycentrizing” limitations need not be labored here. For an action in trespass to lie, the plaintiff has traditionally been required to show a physical intrusion upon land interfering with his interest in exclusive possession.⁸⁴ Although a number of privileges are

⁸³ Although it might at first blush appear that torts lawyers, especially the plaintiffs' bar, would welcome any such expansion of doctors' exposure to liability, in the long run any widespread movement to adopt *Helling* would prove disastrous. There is a very real possibility that the so-called “malpractice crisis” will prompt severe cut-backs in our common law system of negligence-based liability in that field. See, e.g., J. O'CONNELL, *ENDING INSULT TO INJURY* (1975), proposing in broad terms a no-fault insurance scheme for the malpractice field. If to the current difficulties were added the erosion of judicial integrity implicit in the *Helling* decision, the end of the negligence malpractice system would most certainly be quick in coming.

⁸⁴ For the rules governing intentional intrusions, see *RESTATEMENT (SECOND) OF TORTS* §§ 157-64 (1965). For the rules governing reckless, negligent, and accidental intrusions see *id.* §§ 165 & 166. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 13 at 63-75 (4th ed. 1971).

recognized which, in the aggregate, give substantial flexibility to the law of trespass, taken individually these privileges are quite narrowly focused and relatively formal.⁸⁵ And even the principles of public and private nuisance, which were developed early to provide legal remedies in situations which did not satisfy the classic requirements of trespass, traditionally have been subject to the same basic types of formal limitations. For example, in an action based upon public nuisance, in addition to establishing an unreasonable interference with a right common to the general public, a successful plaintiff almost always demonstrated that the defendant's conduct was criminal in nature and that the harm caused the plaintiff was different in kind from that suffered by the general public.⁸⁶ And to succeed on a theory of private nuisance, traditionally the plaintiff was required to show that he was entitled to the private use and enjoyment of land and that the defendant's conduct had substantially and unreasonably interfered with his rights in this regard.⁸⁷ To be sure, in deciding the "substantial and unreasonable" issue, to some extent courts confronted problems of the open-ended, planning variety shown earlier to be beyond their capacity to solve.⁸⁸ But the context of almost all of the classic private nuisance cases was the relatively limited one of a dispute between adjoining landowners; and these critical terms were traditionally defined in a way which reduced the open-endedness of private nuisance cases to manageable levels.⁸⁹

⁸⁵ See RESTATEMENT (SECOND) OF TORTS §§ 167-215 (1965). The rules which come closest to stating broad, open-ended principles are those governing public and private necessity. See *id.* §§ 196 & 197. However, even these rules are quite narrowly circumscribed in their wording.

⁸⁶ See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88 at 583-91 (4th ed. 1971).

⁸⁷ See RESTATEMENT OF TORTS § 822 (1939). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89 at 591-602 (4th ed. 1971).

⁸⁸ Section 826 of the original RESTATEMENT OF TORTS set forth the general rule that an intentional invasion of another's interest in the use and enjoyment of land was unreasonable unless the utility of the actor's conduct outweighed the gravity of the harm; §§ 828 & 829 set forth the factors which were to be weighed in determining the utility of conduct and the gravity of harm. There can be little doubt that, to some extent, courts applying these rules, faced relatively open-ended planning problems. Prosser refers to the course of decision in these cases as a "process of judicial zoning." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89 at 600 (4th ed. 1971).

⁸⁹ Thus, the original RESTATEMENT OF TORTS supplemented the basic rules described in the preceding note with three "specific applications" which disposed of most private nuisance cases: (1) where the defendant's conduct was malicious or indecent (§ 829); (2) where the invasion of another's interest was substantial and could be avoided without undue hardship to the defendant (§ 830); and (3) where the plaintiff's use was, and the defendant's conduct was not, suited to the character of the locality (§ 831). This last application of the general rules governing private nuisance is most important from our present perspective. First, it appears to have been the decisive consideration in a great many cases. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89 at 599-601 (4th ed. 1971); and second, it reduced the open-endedness of this "process of judicial zoning," *id.* at 600, to manageable levels in very much the same way as does judicial reliance upon custom in medical

Recent years have witnessed explosive reforms and developments in the environmental protection field. Again, I am not interested here in tracing the substantive details of these developments, nor am I particularly interested in exploring the shifts in social policies which encouraged and supported them. Instead, my objective is to demonstrate that with these developments has come the tendency increasingly to involve courts in reviewing the reasonableness of decisions and conduct affecting the environment, and that this tendency poses serious threats to the integrity of our judicial process. That courts are increasingly being called upon to address the polycentric problem of planning a rational environment is reflected in what has happened to the traditional formalities surrounding recovery for public and private nuisance. Thus, whatever doubts may have existed in the past,⁹⁰ it is now clearly accepted that the plaintiff in a public nuisance action is not required to show that the defendant's conduct is criminal—in the words of the recent revision of the *Restatement (Second) of Torts*, the plaintiff must merely persuade the court of the presence of “an unreasonable interference with a right common to the general public.”⁹¹ Moreover, to enjoin or abate a public nuisance, one need not suffer harm of a different, or special sort. Instead, according to a recent *Restatement* revision, the plaintiff must show that he “[has] standing to sue as a representative of the general public, or as a citizen in a citizen's action, or as a member of a class in a class action.”⁹² That their proponents intended these expansions of the law of public nuisance to involve courts directly in reviewing the reasonableness of conduct affecting the environment is clear from the proceedings of the American Law Institute which led to their adoption.⁹³ Given the pressures in favor of liberalizing the principles governing standing to sue⁹⁴ and class actions,⁹⁵ these reforms are

malpractice cases. See note 68 *supra* & text accompanying. That these private nuisance cases were, nevertheless, most difficult is suggested by the growth in importance of zoning ordinances in recent years. See Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; Comment, *Real Property—The Effect of Zoning Ordinances on the Law of Nuisance*, 54 MICH. L. REV. 266 (1955).

⁹⁰ For a discussion of whether, as a technical matter, criminality was a requirement for public nuisance at common law, see RESTATEMENT (SECOND) OF TORTS § 6 (Tent. Draft No. 17, 1971).

⁹¹ RESTATEMENT (SECOND) OF TORTS § 821B (1) (Tent. Draft No. 17, 1971).

⁹² RESTATEMENT (SECOND) OF TORTS § 821C (2)(c) (Tent. Draft No. 17, 1971).

⁹³ See 47 ALI PROCEEDINGS 290-305 (1970).

⁹⁴ See, e.g., Eckhardt, *Citizens Groups and Standing*, 51 N.D.L. REV. 359 (1974); Rogers, *The Alice-in-Wonderland World of Standings*, 1 ENV. LAW. 169 (1971); Note, *Administrative Law—Standing to Sue*, 40 BROOK. L. REV. 421 (1973); Comment, *Standing in Environmental Litigation: Let's Get to the Merits*, 10 CAL. WEST. L. REV. 182 (1973).

⁹⁵ See, e.g., Comment, *The Environmental Class Action After Snyder and Zahn: Obtaining Federal Diversity Jurisdiction Over the Class Through Application of Ancillary Jurisdiction*, 6 ST. MARY'S L.J. 866 (1975); Note, *Environmental Class Action: Economic Ramifications of the Rule 23 Nonaggregation Doctrine*, 50 WASH. L. REV. 143 (1974).

almost certain to have their intended effect of involving courts increasingly in environmental planning decisions.

The expansions in the rules governing private nuisance have been even more remarkable. In fact, if recent revisions of the *Restatement (Second) of Torts*, sections on this topic⁹⁶ are reflective of current trends in our case law,⁹⁷ we have already reached the point where the outcome in a private nuisance action is directly determined by a judicial weighing of the relative value to society of plaintiff's and defendant's conduct. To be sure, courts were required to engage to some extent in this sort of weighing process in actions under prior law. But all of the traditional formality of the private nuisance concept has now been swept away. Under the new approach the court is compelled to consider all manner of factors in reaching a decision regarding the unreasonableness of the invasion of the plaintiff's interest, including the factors of whether the plaintiff needs to be paid⁹⁸ and whether the defendant can afford to pay.⁹⁹ The threat to the integrity of the judicial process in attempting to render judgments under such "rules" is enormous; to describe these developments collectively as a "retreat from the rule of law" is to treat them too gently.

Where courts have been slow to compromise their integrity through such expansions of traditional tort doctrines, legislatures have begun to step in to compel this result. The recent Michigan Environmental Protection Act¹⁰⁰ is the clearest example of a statutory mandate that courts take an active role in planning a rational environment. Quite simply, it authorizes anyone in that state to bring anyone else into court to obtain whatever relief may be necessary "for the protection of the air, water and other natural resources and the public trust therein from pollution,

⁹⁶ See RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 16, 1970); §§ 822-28 (Tent. Draft No. 17, 1971); and § 829A (Tent. Draft No. 18, 1972). See generally, Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 THE FORUM 165 (1972).

⁹⁷ The discussion of the revisions of the Restatement sections strongly suggests that, to some extent, the American Law Institute has stated the law as it believes it should be, rather than the law as it really is. See 48 ALI PROCEEDINGS 88, 91 (1971). For a persuasive argument that the Institute similarly overstepped the traditional bounds of its responsibility in its recent adoption of RESTATEMENT (SECOND) OF TORTS § 524A, see Hill, *Breach of Contract As A Tort*, 74 COLUM. L. REV. 40 (1974).

⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 829A (Tent. Draft No. 18, 1972).

⁹⁹ See *id.* §§ 826(b) and 828(d) (Tent. Draft No. 17, 1971). See generally J. HENDERSON, JR. & R. PEARSON, *THE TORTS PROCESS* 749-52 (1975). Admittedly, my negative reaction here may be somewhat influenced by the substantive policy implications of these "ability to pay" and "need to be paid" factors. However, on purely process grounds I insist that courts are not suited institutionally to engage in anything so open-ended as income redistribution on a case by case basis.

¹⁰⁰ MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1973).

impairment or destruction."¹⁰¹ Although it is probably too soon to know whether the courts in Michigan will succeed in holding their own against the obvious threat to their integrity posed by this legislation, the author and most vocal advocate of the statute has recently expressed confidence that they will play an active role in solving the environmental problems of that state.¹⁰² Should the day arrive when Michigan courts are finally badgered into implementing this statute literally, the rule of law will have been sacrificed in the name of social politics.

I should reiterate that I am not reacting to the substantive policy objectives reflected in the expansions of doctrine to which I have referred. We may assume, for purposes of argument, that the time has come for our society to act decisively to prevent further degradation of our natural environment. My point is that courts are no more capable of helping to plan a rational environment than they are capable of helping to design safe consumer products, or reasonable medical procedures. Given sufficiently specific and formal rules of decision, they can play a vital role in enforcing plans established elsewhere; but they cannot, without seriously threatening their integrity, decide whether modes of conduct affecting the environment are "reasonable under all the circumstances." That my concerns in this regard are well founded should be clear to anyone familiar with what is happening in the environmental protection field. Scholarship is overwhelmingly in favor of accelerating the trend towards judicial activism.¹⁰³ Preposterous cases are being brought to court which, were the risks to judicial integrity not so great, would be laughable.¹⁰⁴ Occasionally, judges find themselves compelled

¹⁰¹ *Id.* at § 691.1202(1).

¹⁰² See Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 *ECOLOGY L.Q.* 1 (1974).

¹⁰³ See, e.g., J. SAX, *DEFENDING THE ENVIRONMENT* (1971); Herget, *The Chicago Sanitary and Ship Canal: A Case Study of Law as a Social Vehicle for Managing Our Environment*, 1974 *U. ILL. L.F.* 285; Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 *IND. L.J.* 203 (1974); Peterson & Lawrence, *Challenge of Environmental Quality: An Outline of Remedies to Meet It*, 1 *ENVIRON. LAW* 72 (1970); Pettigrew, *Constitutional Right of Freedom From Ecocide*, 2 *ENVIRON. LAW* 1 (1971); Reitze, *Old King Coal and the Merry Rapists of Appalachia*, 22 *CASE W. RES. L. REV.* 650 (1971); Roberts, *The Right to a Decent Environment: E=MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 *CORNELL L. REV.* 674 (1970); Smith, *The Environment and the Judiciary: A Need for Cooperation or Reform?*, 3 *ENVIRON. AFFAIRS* 627 (1974); Note, *Imminent Irreparable Injury: A Need for Reform*, 45 *SO. CALIF. L. REV.* 1025 (1972). See also notes 94-95 *supra*. But see Crampton & Boyer, *Citizens Suits in the Environmental Field: Peril or Promise?*, 2 *ECOL. L.Q.* 407 (1972); Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 *U. PA. L. REV.* 509 (1974).

¹⁰⁴ See, e.g., *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972) (suit by adjacent property owners to shut down jet traffic at Dulles Airport); *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971) (suit on behalf of 7,119,184 inhabitants of Los Angeles County against 293 of the largest corporations and municipalities to restrain defendants permanently from discharging pollutants into the air).

to respond on the merits where statutes apparently require them to do so. Because the plaintiffs in environmental protection cases almost always seek injunctive relief, the traditional solution of leaving the decision to the jury is rarely available, and judges are left to struggle with the problems without guidance from legal rules of decision. Examples are beginning to appear of the breakdown of the adjudicative process under such circumstances.¹⁰⁵

If there is a source of hope for the maintenance of judicial integrity in the midst of these recent developments, it resides in the enactment and implementation of statutes such as the National Environmental Policy Act of 1969.¹⁰⁶ The Act requires that all federal agencies prepare an Environmental Impact Statement prior to taking any major action which may significantly affect the human environment.¹⁰⁷ From our present process perspective, this Act provides a means by which the mounting pressures for protecting the environment may be accommodated without directly involving the courts in reviewing the substantive merits of environmental controversies. As might be expected, the aspects of the Act which I applaud on process grounds are condemned by activist writers on substantive grounds.¹⁰⁸ In deciding whether impact statements satisfy the Act's requirements, courts have by and large refused to review extensively the merits of proposed

¹⁰⁵ One of the clearest examples to date of a trial court losing its composure under such strains will be found in the district court decision in *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974). The action in that case was brought to enjoin the defendant company's practice of dumping allegedly harmful mining wastes into Lake Superior. After 139 days of trial, which involved over 100 witnesses, over 1,600 exhibits, and which generated over 18,000 pages of transcript, the federal district court granted the relief sought. Toward the end of a long opinion, the district court reveals great frustration and resentment over the defendants' refusal throughout the trial to cooperate with the plaintiffs and the court in working out a sensible solution via negotiation:

[I]n this litigation defendants steadfastly maintained that there was no feasible way for them to put the [wastes] on land. They claimed that the costs of such a system would be prohibitive and that furthermore such a system was technologically infeasible. It is the Court's conclusion that this position was taken by defendants in bad faith, that it was contrary to the facts as they knew them, and was pursued for the sole purpose of delaying the final resolution of the controversy.

380 F. Supp. at 64. In January 1976, the United States Court of Appeals for the Eighth Circuit recognized that a breakdown in the adjudicative process had occurred, and took the unusual step of removing the district judge from the case. In part, the Court of Appeals explained: "[The district judge] seems to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge—impartiality." *Reserve Mining Co. v. Lord*, 8 E.R.C. 1511, 1515 (1976).

¹⁰⁶ 42 U.S.C. §§ 4321-47 (1970).

¹⁰⁷ 42 U.S.C. § 4332(a)(c) (1970).

¹⁰⁸ See, e.g., Sax, *(Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973); Comment, *The Role of the Courts Under the National Environmental Policy Act*, 23 CATH. U.L. REV. 300 (1973); Comment, *NEPA: Full of Sound and Fury . . . ?*, 6 U. RICH. L. REV. 116 (1971).

agency action;¹⁰⁹ and once the impact statement is found to satisfy the procedural requirements of the Act, the decision of whether to continue with the project is left to the discretion of the agency.¹¹⁰ It remains to be seen if judicial implementation of this Act will sufficiently reduce pressures upon courts to allow them to reverse the current trend away from principled judicial decisionmaking in the environmental protection field.

2. Where Evaluation of the Defendant's Conduct Requires Defining the Contours of Special Relationships

Admittedly, the case law developments to be examined in this section do not match the dramatic developments in the fields of products liability, medical malpractice, and environmental protection with respect to their potential economic significance to our society. However, they are important to our present inquiry for several reasons. First, they reveal the same basic pattern of development observed in the preceding section: traditional limitations upon the negligence concept found to be out of step with changing social values are attacked and finally give way, exposing courts to the potential threat of unadjudicable problems. Moreover, the developments about to be examined reveal legal commentators in the familiar role of encouraging the expansion and purification of the negligence concept, most often with no concern whatever for the capacity of courts to cope with their proposals. And finally, and perhaps most importantly, the case law developments in this section suggest that judges' instincts for survival run deep, and that we may yet avoid the sacrifice of judicial integrity implicit in the expansionary trends being examined in this article. As will be made clear in the analyses which follow, courts (and to some extent legislatures) in many jurisdictions appear to be implementing compromise solutions in these cases which manage to accommodate changing social values without unduly threatening the judicial process with problems beyond its capacity to solve. Thus, not only do the patterns of these compromises strongly support the limits of adjudication thesis advanced here, but their accomplishment gives hope for the long-run survival of our common law negligence system.

¹⁰⁹ See, e.g., *Environmental Defense Fund v. Corps of Engrs.*, 348 F. Supp. 916, 925 (N.D. Miss. 1972); *City of N.Y. v. United States*, 344 F. Supp. 929 (E.D.N.Y. 1972); *Daly v. Volpe*, 326 F. Supp. 868, 870 (W.D. Wash. 1971). In some decisions, such as *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), courts have asserted that they have an obligation to review substantive agency decisions on the merits. However, the scope of review—i.e. whether the agency's decision is "arbitrary and capricious"—insulates the courts from threatening levels of polycentricity.

¹¹⁰ See, e.g., *Environmental Defense Fund v. Corps of Engrs.*, 348 F. Supp. 916, 925 (N.D. Miss. 1972).

a. Intrafamily Negligence Actions

Consistent with my thesis in this article, the pattern of judicial law reform in intrafamily negligence actions is basically similar to the patterns already observed in the preceding discussions. Whatever their historical origins¹¹¹ or the social policy explanations traditionally advanced for their adoption,¹¹² the immunities from liability traditionally granted to spouses,¹¹³ parents,¹¹⁴ and minor children¹¹⁵ served the important function of insulating courts from the difficult task of adjudicating answers to the question, "What sort of conduct, vis-à-vis personal safety, may close family members reasonably expect from each other?" What renders this task difficult are the special relationships between close family members which must be taken into account in these cases. In effect, had the immunities not been granted, courts would have been required in many intrafamily negligence cases to design "reasonably prudent husbands," or "reasonably prudent parents," in much the same way as they would have been (and, in some states, are now being) required to design "reasonably safe products" in product design liability cases,¹¹⁶ or "reasonably prudent medical treatment" in malpractice cases.¹¹⁷ Admittedly, the issues in an intrafamily dispute are not likely to be technologically difficult or complex. But as long as it is recognized that the many special facets of the interspousal, or parent-child, relationship must be taken into account, the negligence issue in such cases is sufficiently polycentric to frustrate honest attempts to submit it to adjudication.

Until fairly recently, intrafamily immunities from negligence liability have served the function just described. Exceptions to these immunities have long been recognized—for example, courts have tradition-

¹¹¹ Historically, interspousal immunity developed from the concept that a husband and wife were one person, and thus suit by one spouse against the other was a legal impossibility. *See, e.g.,* *In re Estate of Pickens*, 255 Ind. 119, 122, 263 N.E.2d 151, 153 (1970); *Ebel v. Ferguson*, 478 S.W.2d 334, 335 (Mo. 1972).

¹¹² Suits between spouses or between parents and children have been prohibited traditionally on the grounds that such suits would cause intrafamily discord and strife. *See, e.g.,* *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970); *In re Estate of Pickens*, 255 Ind. 119, 122, 263 N.E.2d 151, 153 (1970). Another reason given by some courts is that such suits would encourage collusive and fraudulent suits. *See, e.g.,* *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 (1969).

¹¹³ *See, e.g.,* *Ebel v. Ferguson*, 478 S.W.2d 334 (Mo. 1972); *Turner v. Turner*, 385 S.W.2d 230 (Tex. 1964).

¹¹⁴ *See, e.g.,* *Downs v. Poulin*, 216 A.2d 29 (Me. 1966); *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972); *Campbell v. Gruttemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968).

¹¹⁵ *See, e.g.,* *Latz v. Latz*, 10 Md. App. 720, 272 A.2d 435 (1971); 77 N.M. 139, 420 P.2d 127 (1966); *Chase v. Greyhound Lines, Inc.*, — W.Va. —, 195 S.E.2d 810 (1973).

¹¹⁶ *See* pp. 488-89 *supra*.

¹¹⁷ *See* pp. 491-93 *supra*.

ally been willing to listen where intrafamily disputes concern rights in property.¹¹⁸ However, these exceptions are consistent with my thesis due to the relative formality of the rules governing liability in such cases. Courts can afford to respond on the merits when a child sues his parent over rights to property because the rules governing such disputes are among the most formal in our law. The potential threat to judicial integrity has come with the recent trend toward abrogation of the intrafamily immunities in negligence cases. Beginning in the 1960's, these immunities in some jurisdictions appear to have suffered the same fate as have the formal limitations upon liability for unsafe product design described earlier, and a growing number of courts purport to have adopted an approach to liability in these cases which will determine a family member's negligence under all the circumstances.¹¹⁹ Expansion of the negligence concept via abrogation of intrafamily immunities has been supported in the commentaries,¹²⁰ in at least one instance in a manner displaying a remarkably cynical indifference to the potential threat to the integrity of the judicial process.¹²¹

Significantly, some jurisdictions have only partially abrogated the intrafamily immunities, in ways which support the validity of the thesis here advanced. Thus, although courts in these jurisdictions allow intrafamily negligence actions where the occurrence giving rise to the claim is one in which family members have interacted in a manner typical of strangers acting at arm's length, the immunity has been retained where the interaction of the parties to a negligence claim relates directly to their relationship as family members (and thus would threaten the courts with unadjudicable problems).¹²² Of course, these partial abrogations

¹¹⁸ See, e.g., *Hunter v. Livingston*, 125 Ind. App. 422, 428-29, 123 N.E.2d 912, 915 (1954) and cases cited therein.

¹¹⁹ Although these cases arose out of automobile or plane accidents, and thus did not directly involve the intrafamily relationships, the courts speak in broad terms of total abolition of immunities. See, e.g., *Gibson v. Gibson*, 92 Cal. Rptr. 288, 479 P.2d 648 (1971); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

¹²⁰ See, e.g., Greenstone, *Abolition of Intrafamilial Immunity*, 7 THE FORUM 82 (1972); Note, *Interspousal Immunity—The Common Law Doctrine of Interspousal Immunity in Tort Held Abrogated in Indiana*, 6 IND. L. REV. 558 (1973); Note, *Interspousal Immunity—Time for a Reappraisal*, 27 OHIO ST. L.J. 550 (1966); Comment, *Abrogation of the Parent-Child Immunity Doctrine*, 12 S.D.L. REV. 364 (1967). But see Comment, *Intrafamily Immunity—The Doctrine and Its Present Status*, 20 BAYLOR L. REV. 27, 69-70 (1967).

¹²¹ See Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239 (1974). The author recognizes that abrogation of the immunities may lead to a thinly disguised compensation system, but justifies the hypocrisy on the basis of social politics. *Id.* at 252.

¹²² See, e.g., *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S. 2d 859 (1974) (parental immunity retained in children's actions against parents for negligent supervision); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1971) (parental immunity retained in

may to some extent be explained by the substantive policy considerations traditionally advanced in support of intrafamily immunities.¹²³ However, at least one court has explained its position in language which strongly suggests that process considerations weighed in the decision.¹²⁴

It is difficult to predict the future course of decision in those jurisdictions which purport to have abrogated the intrafamily immunities completely. From our present perspective it should be noted that in every instance discovered thus far in which courts have opted for total abrogation, they have done so in cases which on their facts have not required a consideration and weighing of special family relationships.¹²⁵ If I am right, and the weighing of that factor by courts would present them with unmanageable problems, it seems unlikely that these courts will actually abandon the immunities in cases which more severely test their resolve on this issue.¹²⁶ If total abrogation should eventually gain

cases where alleged negligent act involves exercise of parental authority over child or exercise of ordinary parental discretion with respect to provision of food, clothing, housing, etc.); *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972) (parental immunity retained in same cases as in *Rigdon*); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (parental immunity retained in same cases as in *Rigdon*). See also *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970); *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971); in which the courts appear to have limited the abrogations to cases which did not involve the special family relationships.

¹²³ That is, one might conclude that the immunities are being retained in cases involving the special family relationships in order to foster the free and uninhibited exercise of intrafamily responsibilities.

¹²⁴ In *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), the court discussed traditional reasons for retaining parental immunity in negligent supervision actions (family discord, depletion of family resources) and then went on to discuss the unadjudicability of a parent's duty to supervise. "An additional factor to be placed on the policy scale is the difficulty of judicial delimitation, either by court or by jury, of the bounds of the asserted right to supervision. The possibilities are virtually limitless . . ." *Id.* at 49, 324 N.E.2d at 345-46, 364 N.Y.S.2d at 870.

¹²⁵ See, e.g., *Hebel v. Hebel*, 435 P.2d 8 (Alaska 1967) (car crash; parental immunity abrogated); *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282 (1970) (car accident; parental immunity abrogated); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972) (car accident; interspousal immunity abrogated); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966) (car crash; child immunity from parental suit abolished); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966) (car accident; parental immunity abolished); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970) (car accident; interspousal immunity abrogated); *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975) (airplane crash; interspousal immunity abolished); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (car accident; child immunity from parental suit abrogated); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971) (car accident; parental immunity abolished); *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971) (car accident; interspousal immunity abrogated).

¹²⁶ THE RESTATEMENT (SECOND) OF TORTS in §§ 895G and 895H (Tent. Draft No. 18, 1972), has adopted total abrogation of intrafamily immunities. Comment j. to § 895H recognizes the legitimacy of the position described herein as "partial abrogation," but prefers to speak of completely abolishing the immunities and then leaving the elements of special family relationships to be weighed on a case by case basis in determining whether a breach of duty has occurred. Conceptual logic aside, the *Restatement* position completely over-

the day, and courts generally should begin addressing questions such as "How would a reasonable mother behave towards her child under similar circumstances?", then case by case implementation of the negligence concept in intrafamily torts disputes will begin to encounter serious difficulties. Focussing upon a presumed lack of contentiousness between the parties to such actions, several observers have already detected an erosion of integrity in intrafamily negligence cases that do not involve special family relationships.¹²⁷ If to these difficulties were added the unmanageable task of designing family relationships in court, all pretense of principled decisionmaking would surely vanish. In that event, it would not take long for the negligence lottery in such cases to be replaced, almost certainly legislatively, by some more honest and efficient system of compensating the victims of intrafamily accidents.¹²⁸

b. Negligence Actions Against Governmental Agencies

The history of the origins of the sovereign immunity doctrine and its gradual abrogation in recent years has been thoroughly chronicled elsewhere and need not be repeated.¹²⁹ From our present perspective, the pattern should by now be familiar. Although justified traditionally on the basis of logic¹³⁰ and practical politics,¹³¹ the immunity from tort liability granted to agencies of government nevertheless served the necessary function of insulating courts from the hopelessly polycentric task of helping to manage the relationships between the sovereign and its

looks the process implications of treating these issues under the heading of breach rather than immunity. I can only hope that courts have the good sense to resist the influence of the *Restatement* on this point.

¹²⁷ See, e.g., *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972) (Brennan, J., dissenting); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970) (Francis, J., dissenting). See Ashdown, *Intrafamily Immunity, Pure Compensation, and the Family Exclusion Clause*, 60 IOWA L. REV. 239, 253 (1974).

¹²⁸ The author of the article in the preceding footnote advocates just such a no-fault compensation system.

¹²⁹ The historical origins of governmental immunity are traced and the early cases analyzed in a series of articles by Borchard entitled *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 221 (1924); and *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926), 28 COLUM. L. REV. 577, 734 (1928). See also Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 209 (1963). A state by state breakdown of the effects of recent reforms and the status of governmental immunity at the state and local levels appears in a note to §§ 895B and 895C of the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 19, 1973).

¹³⁰ See, e.g., Justice Holmes' famous dictum in *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907): "A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." For a criticism of Holmes' statement see Jaffe, *supra* note 129, at 4-5.

¹³¹ Prosser suggests two such reasons: (1) a reluctance to divert public funds to compensate for private injuries; and (2) the inconvenience and embarrassment which would be caused by tort actions against agencies of government. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131 at 975 n.51 (4th ed. 1971).

subjects. If judicial integrity would be threatened by the question, "How should a reasonable parent behave toward his children?"¹³² it would surely be overwhelmed were courts to attempt to adjudicate answers to the question, "How should a reasonable government behave toward its citizens?" However, given the mounting social pressures favoring compensation for accident victims, and consistent with the trend toward expansion and purification of the negligence concept, courts have begun abrogating the sovereign immunity doctrine in recent years.¹³³ Gradually this tendency has accelerated, accompanied by judicial expressions of frustration over the difficulties of developing a sensible, workable system of governmental liability on a case-by-case basis.¹³⁴

To this point, of course, the foregoing narrative bears a striking resemblance to descriptions offered above of recent developments in other areas of negligence law: a time-honored, formal limitation upon the basic negligence concept outlives its social usefulness and is finally abandoned, exposing courts to open-ended planning problems beyond their capacity to solve. However, in this instance the story has a different, happier, ending. Instead of the negligence-based liability of governmental agencies expanding to the point that judicial integrity would be threatened and destroyed, compromise solutions have been worked out which strike a balance between the desirability of governmental accountability in tort for the negligent behavior of its agencies and the necessity that courts refrain from addressing problems which are beyond their inherent capacities to solve.

The substantive content of the compromises between the need for, and the inherent limits upon, judicial review of the decisions and conduct of governmental agencies could not be more consistent with the thesis herein advanced. Although jurisdictions vary in their manner of expression,¹³⁵ the basic principles determining whether or not govern-

¹³² See text accompanying notes 35 & 114-20 *supra*.

¹³³ See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Willis v. Dept. of Conservation*, 55 N.J. 534, 264 A.2d 34 (1970).

¹³⁴ See, e.g., *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972):

Exactly what constitutes a proprietary function as opposed to a governmental function has never been clearly enunciated by the courts, and this failure to establish a criteria has led to the generally confused state of the bench and bar in the application of the doctrine of sovereign immunity. Deciding on useful guidelines between rather obscure, whimsical notions enunciated by the appellate courts throughout the country has caused enormous conflicts in the courts in the past decade

Id. at 59, 284 N.E.2d at 735.

¹³⁵ The Federal Torts Claims Act precludes liability of the United States government for claims based on the "exercise or performance or the failure to exercise or perform a discretionary function or duty" 28 U.S.C. § 2680(a) (1970). Section 895B of the

ment is immune from tort liability are these: where the conduct labelled negligent by the plaintiff is such that a decision with respect to its reasonableness does not necessitate defining the contours of the special relationship between the government and its citizens, there is no immunity from liability;¹³⁶ but in cases where the court would be required to define the contours of that relationship, the traditional rule of sovereign immunity is retained.¹³⁷ The striking similarity between this approach and that being taken in some jurisdictions in abrogating traditional intra-family immunities¹³⁸ is not accidental—both approaches define the extent of the defendant's liability in a way that provides the maximum protection to injured plaintiffs consistent with the requirement that the courts refrain from responding to the sorts of polycentric issues of social planning that would compromise their integrity. Although discussions of sovereign immunity have tended to focus on the substantive policy objectives of the doctrine, these judicial process considerations have been recognized by a number of writers.¹³⁹

The importance of these reforms of governmental tort liability in the present context goes substantially beyond the support their content implicitly gives to my thesis concerning the limits of adjudication. Of no less significance than their substance has been their manner of accomplishment. To an extent unique among the areas of reform and development considered in this article, the modifications of the sovereign immunity doctrine in recent years has been the product of legislative, rather than judicial, action.¹⁴⁰ Several different patterns of interaction

RESTATEMENT (SECOND) OF TORTS extends immunity to the states for "acts and omissions constituting . . . the exercise of an administrative function involving a basic policy decision." (§ 895B(3)(b), Tent. Draft No. 19, 1973). The Supreme Court of Washington extended the immunity to "the exercise of basic policy evaluation, judgment and expertise." *Evangelical United Brethren Church of Adna v. State*, 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1965).

¹³⁶ See, e.g., *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971) (steps at county courthouse fell into disrepair, causing injuries); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (negligence of school bus driver caused accident).

¹³⁷ See, e.g., *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (failure to provide police protection); *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960) (discretionary decisions by traffic planning officials regarding traffic control system at intersection). See generally Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958). For statutory rules see authorities cited note 142 *infra*.

¹³⁸ See note 122 *supra* & text accompanying.

¹³⁹ That is, a number of writers have questioned the ability of courts to develop workable compromises on a case by case basis. See, e.g., Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 235-39 (1963); Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 465 (1963); Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 893-94.

¹⁴⁰ The tort liability of the United States government is now controlled by the Federal Torts Claims Act, 60 Stat. 812 (1956). The provisions of the act appear in various sections

between courts and legislatures emerge from a review of the developments over the last 30 years. In many instances, legislatures have acted ahead of courts in abrogating the traditional rule of immunity and replacing it with some form of compromise conforming to the basic principle outlined above.¹⁴¹ On the other hand, in many jurisdictions legislation has followed, and been prompted by, judicial abrogation of the doctrine of sovereign immunity.¹⁴² Most often, these statutes have conformed to the basic outlines of compromise described earlier.¹⁴³ In some states, legislation has instead focused on the relatively superficial (from the present process perspective) aspect of protecting the public fisc, either by placing limits upon recovery¹⁴⁴ or by waiving the immunity only where liability insurance is available as a fund from which to pay the plaintiff.¹⁴⁵

It would be unfair to conclude that courts have played no role in working out the details of these compromises—in some states, courts have built upon early legislative efforts and have developed sensible compromise positions which accommodate both the rights of injured plaintiffs and a recognition of the limits of adjudication.¹⁴⁶ But it is accurate to describe the recent reforms in the area of governmental liability as having a distinctly legislative, as opposed to judicial, flavor. The significance of this fact lies in its implications for long-range solutions to similar problems beginning to appear in other areas of negligence law,

of the United States Code. For a compilation of these sections see 2 L. JAYSON, *HANDLING FEDERAL TORTS CLAIMS*, Appendix 1 (1974). See also James, *The Federal Torts Claims Act and the "Discretionary Function" Exception*, 10 U. FLA. L. REV. 184 (1957); Reynolds, *The Discretionary Function Exception of the Federal Torts Claims Act*, 57 GEO. L.J. 81 (1968). For a comprehensive, state-by-state compilation of the statutes governing state and local immunities from tort liability see the note accompanying §§ 895B and 895C of the RESTATEMENT (SECOND) OF TORTS (Tent. Draft, No. 19, 1973). For a useful description of the cooperative efforts of legislatures and courts in a number of states see Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

¹⁴¹ This was basically the pattern followed in the adoption of the Federal Torts Claims Act. See also, e.g., CONN. GEN. STAT. REV. §§ 4-141 *et seq.* (1966); HAWAII REV. STAT. §§ 662-1 *et seq.* (1968); MASS. ANN. LAWS, ch. 12, §§ 3A-3D (1966); MICH. STAT. ANN. § 3.996 (113) (1969); N.Y. CT. CL. ACT § 8 (1963).

¹⁴² See, e.g., CAL. GOV'T. CODE §§ 810 *et seq.* (West 1966); COLO. REV. STAT. ANN. §§ 24-10-101 *et seq.* (1974); ILL. ANN. STAT. ch. 85, §§ 1-101 *et seq.* (Smith-Hurd 1966); MINN. STAT. ANN. §§ 466.01 *et seq.* (1963); N.J. STAT. ANN. § 59:1-1 *et seq.* (Supp. 1972).

¹⁴³ That is, they have tended to create a number of relatively specific instances where the immunity from liability is retained as a barrier to the courts' considering the special relationship between government and its citizens. See notes 140-42 *supra*.

¹⁴⁴ For a critical discussion of this approach, see Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 970-72.

¹⁴⁵ See, e.g., GA. CODE ANN. § 69-301 (1967); KAN. STAT. ANN. §§ 74-4715, 74-4716 (Supp. 1971); MONT. REV. CODE ANN. §§ 83-701 *et seq.* (1968).

¹⁴⁶ Perhaps the best example of this sort of development is to be found in New York. The legislature unconditionally abolished the immunity (N.Y. Ct. Cl. Act § 8 (1963)), and the courts have worked out a remarkable system of compromise solutions extending immunity to certain governmental activities. See note 137 *supra*.

some of which have been explored in this article: if the courts are not capable of developing workable sets of rules with which to keep the problems before them within proper bounds,¹⁴⁷ then legislatures may be forced to step in and impose the necessary formalities by statute. Of course, undoubtedly there are special reasons why legislatures have tended to move quickly in the area of governmental liability. Probably the most important factor is the practical reality that the politicians who constitute such deliberative bodies are especially sensitive to the budgetary implications of total judicial abrogation of governmental immunity. Moreover, there is a basic, almost constitutional, dimension to the problem presented by independent judicial review of policy decisions of government.¹⁴⁸

And yet, I submit that in the long run the limits of adjudication principle which I have advanced in this article will force the same pattern of legislative response in some of the other areas in which the negligence concept has undergone expansion and purification in recent years. Thus, it is only a matter of time before scholars, judges, and legislators come to realize that the same legal process difficulties posed by ad hoc judicial review of governmental policy planning decisions are presented whenever courts attempt to review such planning decisions, whether they are decisions reached by design engineers, doctors, businessmen, or parents. To be sure, the practical politics of these various situations are different. Presumably, agencies of government can be trusted in a way that businessmen cannot (and parents and doctors fall somewhere in the middle). But from the present process perspective the problems posed by all of these situations are basically the same. Because the abrogation of sovereign immunity dramatically threatens the economic viability of the agencies of government toward which it is directed, the process problems it poses have, thus far, received the greatest attention. But if I am correct regarding the confusion and chaos which lies ahead if courts continue to expand the scope of ad hoc, negligence-based review in other areas, it is only a matter of time before these other areas catch up. When they do, and chaos finally descends upon us, the recent patterns of reform in the governmental liability-

¹⁴⁷Cf. notes 134 and 139 *supra*. But cf. note 146 *supra*.

¹⁴⁸Thus, even the most persistent advocate for reform in this area has admitted the necessity of such limits, albeit on essentially substantive grounds: "Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks." Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924). For treatments of the constitutional dimensions of sovereign immunity, see generally Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19-29 (1963).

immunity area strongly suggest that legislatures will play an active role in setting things right.¹⁴⁹

c. Negligence Actions Against Possessors of Land

The principal utility of this topic in the present context resides not so much in its practical importance as in the clarity with which it demonstrates the current trend toward expansion of the negligence concept. No clearer example can be found of the tendency in recent years for courts to abandon traditional formalities in favor of the core principle of reasonable care under the circumstances of each case, nor is it possible to imagine an area in which legal commentators have been more enthusiastically and unanimously in support of such developments. In fact, if one were to focus solely upon the theoretical aspects of the subject, the recent expansion of negligence-based liability of possessors of land probably deserves to be recognized as a paradigm of the sort of development I have been examining in this article.¹⁵⁰

At common law, the duty owed by a possessor of land to one coming on the land depended upon the relationship between the possessor and entrant. Those who entered with the possessor's permission and in furtherance of a business purpose of the possessor were deemed invitees, to whom the possessor owed the duty of reasonable care to see that the premises were reasonably safe and did not expose the entrant to undue risks of harm.¹⁵¹ Those who entered with the possessor's permission but not in furtherance of the latter's business purpose were deemed licensees and were owed a lesser, though not insubstantial, duty of care.¹⁵² And those who entered without permission were deemed trespassers, to whom very little in the way of legal duties were owed.¹⁵³ Over time, as the social policies supporting the ownership and use of private land gave way to policies favoring greater protection of entrants from risks of

¹⁴⁹ Professor Peck has advanced the thesis that one of the basic functions of judicial law reform in torts is to provoke necessary legislative enactments in response. See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

¹⁵⁰ An activist writer has recently concluded: "Rowland [a recent California decision expanding the negligence concept in this area—see notes 160 *et seq. infra*] is not an isolated instance of judicial reform of the common law; rather it is part of a policy oriented judicial activism which is remaking the entire body of tort law and abrogating traditional limitations on recovery." Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 U.C.L.A.L. REV. 820, 823 (1975).

¹⁵¹ See RESTATEMENT (SECOND) OF TORTS §§ 332, 341A, 343-44 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61 at 385-98 (4th ed. 1971).

¹⁵² See RESTATEMENT (SECOND) OF TORTS §§ 330, 341-42 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60 at 376-85 (4th ed. 1971).

¹⁵³ See RESTATEMENT (SECOND) OF TORTS §§ 329, 333-39 (1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 58-59 at 357-76 (4th ed. 1971).

harm believed to be avoidable at relatively low cost, formal exceptions to the harsher aspects of the rules governing liability to trespassers were recognized and developed.¹⁵⁴ This process of recognizing exceptions and drawing distinctions continued into the present century, until a complex and relatively formal body of negligence doctrine governed the rights and duties of those in the special relationships of possessors of, and entrants on, land.¹⁵⁵

Scholarly treatments of the social policies underlying this body of doctrine have traditionally emphasized the importance attached to the ownership and possession of land at common law and the necessity of limiting possessors' liability in the interests of promoting efficient and therefore socially beneficial patterns of land use.¹⁵⁶ From our present perspective, of course, this same body of doctrine also served the equally important function of screening courts from the potentially unmanageable open-endedness of the basic, underlying question implicitly involved in all such cases: "What, in the way of minimum safety precautions to those coming on the premises, can society require from persons in the peculiarly important position of owning, occupying, and using land?" As long as society continued to view the relationship between land possessor and entrant as deserving of special consideration, the formal rules governing possessors' liability were a necessary prerequisite to the adjudicability of negligence cases involving the plaintiff's entry on land.¹⁵⁷

Two forces combined to threaten the survival of the common law system of possessors' liability: first, the mounting social pressures favoring compensation of accident victims as an end in itself,¹⁵⁸ and second, the growing tendency in modern legal thought to view formality of any

¹⁵⁴E.g., the exceptions favoring constant trespassers on a limited area (RESTATEMENT (SECOND) OF TORTS §§ 334-35 (1965)), known trespassers, *id.* at §§ 336-38, and trespassing children, *id.* at § 339.

¹⁵⁵Prosser seems to be ambivalent in his attitude towards these doctrines. On the one hand, he refers to them as "[t]he system of rigid categories . . . into one of which the plaintiff must be forced to fit . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 62 at 398 (4th ed. 1971). And on the other, he refers to "the rules as to trespassing children which were worked out over so many years with so much blood, sweat, toil and tears . . ." *Id.* at 399 n.4.

¹⁵⁶See, e.g., W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 58 at 357-59 (4th ed. 1971); Goodrich, *Landowner's Duty to Strangers on His Premises—As Developed in the Iowa Decisions*, 7 IOWA L. BULL. 65 (1922).

¹⁵⁷In this respect, the rules governing possessors' liability bear a striking resemblance to the exceptions to the privity rule worked out in products cases during the period preceding *MacPherson v. Buick Co.* See notes 41-45 *supra* & text accompanying. See also note 203 *infra* & text accompanying.

¹⁵⁸See note 37 *supra* & text accompanying. Not surprisingly, Professor James has been an outspoken critic of the formal rules limiting possessors' liability. See 2 F. HARPER & F. JAMES, LAW OF TORTS 1430-1505 (1956).

kind as an unnecessary impediment to achieving justice in every case.¹⁵⁹ Thus, it was probably inevitable that so forward-thinking a tribunal as the Supreme Court of California would eventually conclude, as it did in its well known decision in *Rowland v. Christian*,¹⁶⁰ that such a body of formal negligence doctrine constituted a "semantic morass . . . contrary to our modern social mores and humanitarian values,"¹⁶¹ and would discard it in favor of determining liability on the more aesthetically pleasing basis of the reasonableness of the defendant's conduct under all of the circumstances.¹⁶² Given the enthusiastic support which this decision has received from the commentators,¹⁶³ it is hardly surprising that other jurisdictions have followed California's lead.¹⁶⁴

In properly assessing these recent developments from a process perspective, it is necessary to examine them more closely. It will be recalled from the outset that the process difficulties of concern in this section stem from the necessity for the courts to define the contours of special relationships in deciding the negligence issue.¹⁶⁵ Certainly there would be little basis for objection on process grounds if the California court in *Rowland* had concluded that the "modern social mores and humanitarian values" to which it refers have progressed to the point that the relationships between possessors and entrants are no longer special—i.e., are no different from the relationships which generally obtain between strangers in our society acting at arm's length. Had the court in *Rowland* gone all the way to denying completely the relevance of the possessor-entrant relationship, there is no reason to think that the traditional

¹⁵⁹ See notes 39-40 *supra* & text accompanying.

¹⁶⁰ 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

¹⁶¹ *Id.* at 116, 118, 443 P.2d at 566, 568, 70 Cal. Rptr. at 102, 104.

¹⁶²

The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

¹⁶³ See, e.g., Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 U.C.L.A.L. REV. 820 (1975); Comment, *Torts—Occupier's Liability Entrants—"Invitee," "Licensee," and "Trespasser" Distinction Abolished*, 23 ARK. L. REV. 153 (1969); Comment, *Torts—Negligence—Premises Liability: The Foreseeable Emergence of the Community Standard*, 51 DEN. L.J. 145 (1974); Comment, *Occupier of Land Held to Owe Duty of Ordinary Care to All Entrants*, 44 N.Y.U.L. REV. 426 (1969); Note, *A Re-examination of the Land Possessor's Duty to Trespassers, Licensees and Invitees*, 14 S.D.L. REV. 332 (1969).

¹⁶⁴ See, e.g., *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972); *Mario-renzi v. Joseph DiPonte, Inc.*, — R.I. —, 333 A.2d 127 (1975); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Pickard v. Honolulu*, 452 P.2d 445 (Hawaii 1969).

¹⁶⁵ See pp. 479-81 *supra*.

combination of the reasonable man test and the lay jury verdict would not have sufficed to obscure the analytical difficulties in such cases.¹⁶⁶

But that is *not* what the California court concluded. Quite to the contrary, the majority in *Rowland* asserted that the status of the plaintiff, and hence the relationship between possessor and entrant, will remain an important consideration in these cases.¹⁶⁷ What the *Rowland* court actually opposed was not giving weight to the plaintiff's status, but giving that factor controlling or conclusive weight by means of formal rules of decision.¹⁶⁸ Thus, the holding in that case is not so much an attack on the politics supporting the traditional rules of possessor's liability as it is an attack on the formalities which rendered those rules adjudicable. Under *Rowland*, the triers of fact presumably will be expected, as before, to take the relationship between possessor and entrant into account, but now without any formal guidance from the law. Thus, they will be expected to give meaning and effect to that relationship on a case by case basis, guided only by common sense and intuition. Purporting as it does to retain the substance of the prior law, while abandoning its form, the decision epitomizes what I have characterized as the retreat from the rule of law.

Given the potential difficulties of implementing the *Rowland* approach, it is not surprising that a number of courts have refused to follow the California lead. Several jurisdictions have rejected *Rowland* outright.¹⁶⁹ Others have determined to withhold final decision on whether or not to abandon traditional doctrines until further experience under the new approach is gained in other jurisdictions.¹⁷⁰ And reflecting the

¹⁶⁶ See notes 29-31 *supra* & text accompanying.

¹⁶⁷

Once the ancient concepts as to the liability of the occupier of land are stripped away, *the status of the plaintiff relegated to its proper place in determining such liability*, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. (Emphasis added.)

69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

¹⁶⁸ I rely upon two factors in reaching this conclusion. The first is the language of the opinion itself. See notes 162 and 167 *supra*. The second factor is a deeply ingrained hunch that the court really does not intend to abandon the centuries-old bias against trespassers coming onto the land, and that in an appropriate case the court will permit the jury to weigh the plaintiff's trespasser status as a limiting factor apart from its effect upon foreseeability. Obviously the dissenters in *Rowland* share my suspicion. See 69 Cal. 2d at 120-21, 443 P.2d at 569, 70 Cal. Rptr. at 105. And the retention of the traditional doctrines limiting possessors' liability to trespassers by courts willing otherwise to accept *Rowland* as to licensees and invitees (see note 169 *infra*) suggests I may be right. If I am, and if the California court is not actually ready to treat trespasser cases on the basis of foreseeability, then one can expect that the special status of trespassers will be reintroduced, perhaps gradually, into the rules governing possessors' liability in that state.

¹⁶⁹ *E.g.*, *Robles v. Severyn*, 19 Ariz. App. 61, 504 P.2d 1284 (1973); *Astleford v. Milner Enterprises, Inc.*, 233 So. 2d 524 (Miss. 1970).

¹⁷⁰ *E.g.*, *Werth v. Ashley Realty Co.*, 199 N.W.2d 899 (N.D. 1972); *DiGildo v. Caponi*, 18 Ohio St. 2d 125, 247 N.E.2d 732 (1969).

reality that the cases which will pose the greatest process difficulties will be those involving plaintiff trespassers,¹⁷¹ several courts have adopted the *Rowland* decision as it applies to licensees and invitees but have retained the traditional doctrines limiting possessors' liability to trespassers.¹⁷² Bearing in mind the extent to which commentators have praised *Rowland's* humanitarian stance,¹⁷³ these decisions suggest that judges often have more common sense than the people who write about them.

3. Where Practical Limits Must Be Placed Upon the Extent of Potential Liability

The difficulties in the cases in this section reflect the reality that the torts process cannot, as a practical matter, offer a remedy to everyone who claims to have been harmed by antisocial conduct.¹⁷⁴ Traditionally, tort law has been content to address what may be characterized as the wide mid-range of social problems—where controversies are either too trivial or too consequential, the torts process has refused, based upon social policy considerations, to let itself become involved. Thus, tort remedies are rarely afforded in situations in which the harm typically suffered by the plaintiff is considered too small to justify the transactional costs of addressing the problem legally;¹⁷⁵ and in situations where

¹⁷¹ Trespasser cases will be the most difficult because the courts will feel the greatest pressures to take the plaintiff's special status into account. I strongly suspect that courts will encounter little difficulties in abandoning the licensee-invitee distinction. That is, courts are probably ready and willing to treat licensees and invitees alike with respect to their arm's length relationships with possessors of land, and to retreat from rules which placed licensees at a legal disadvantage. However, I equally strongly suspect that courts are not ready to concede that the duties owed to trespassers are to be determined by the same principles of foreseeability that determine the duties of care owed generally by persons dealing with one another at arm's length in our society. Thus, courts which purport to have abandoned traditional doctrines governing liability to trespassers will be forced to define the contours of the possessor-trespasser relationship on a case-by-case basis.

¹⁷² *E.g.*, *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Mousey v. Ellard*, 73 Mass. A.S. 871, 297 N.E.2d 43 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 U.W.2d 639 (1972).

¹⁷³ See note 163 *supra*.

¹⁷⁴ See generally C. MORRIS, MORRIS ON TORTS 8-10 (1953); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 1 & 2 at 6-7 (4th ed. 1971).

¹⁷⁵ Two basic approaches have been employed in achieving this objective. For unintentional wrongs, which historically grew out of the development of trespass on the case, actual loss or damage must be proven. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143-44 (4th ed. 1971). And for intentional wrongs, where harm is presumed, the rules governing liability have traditionally been quite formal, requiring in every instance something more than merely the defendant's intent to harm the plaintiff. For example, for an offensive battery to be committed, the defendant must contact the plaintiff's person (see RESTATEMENT (SECOND) OF TORTS § 13 (1965)). To be sure, the recognition in recent years of the right to recover for intentionally inflicted emotional upset (see RESTATEMENT (SECOND) OF TORTS § 46 (1965)) to some extent introduces into the rules governing intentional torts the same sort of open-endedness that we are here examining in the negligence context. However, the rule establishing this new generic tort attempts to replace qualitative formality (*e.g.*, the requirement of contact in battery, *supra*) with "quantitative formality" (*i.e.*, the defendant's conduct must be "outrageous" and the plaintiff's distress "severe"). The ques-

the potential liability of the defendant is so enormous that its imposition would generate dislocation costs greater than those already suffered by the plaintiff, the tort system has similarly refused to allow recovery.¹⁷⁶

There are two basically different perspectives from which to view this aspect of the tort system. From the social policy perspective, the important problem is one of assigning relative values to the various interests at stake, and deciding when to view as "trivial" or "enormous" the harmful consequences of defendants' behavior. From the process perspective, the problem is one of defining the limitations upon liability with sufficient formality to allow the courts to implement them in a principled fashion. It should be understood that from the process perspective the system could function perfectly well if no limits upon potential tort liability were fixed—the necessity to set limits comes from social policy, rather than process, considerations. But once the decision is made to set limits, process considerations dictate that the limits be set with sufficient formality to support adjudication. Once again, it is the process, rather than the social policy, perspective which I shall emphasize here. In the sections which follow I shall examine two recent examples of courts abandoning traditional, formal limitations upon liability in negligence, and I shall attempt to demonstrate the potential threat to the integrity of the judicial process posed by these developments.

a. Actions for Negligently Caused Fright Without Impact

The process function served by the traditional rule in personal injury actions requiring that the defendant's negligent conduct cause a physical impact upon the plaintiff's person¹⁷⁷ should be clear. Although writers have tended to focus on the possibility of fraudulent claims,¹⁷⁸ the more substantive problem is one of avoiding potentially limitless liability.¹⁷⁹ From the beginning courts have recognized the practical necessity in some situations of limiting liability for negligent conduct by more

tion of whether these quantitative limits will work to render the new tort manageable is beyond the scope of this article.

¹⁷⁶See notes 181-84 and 199 *infra*.

¹⁷⁷The leading case is *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). For a recent case reaffirming the physical impact requirement in negligence cases see *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974).

¹⁷⁸See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 54 at 328 nn.38-39 (4th ed. 1971): "It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims."

¹⁷⁹The opinion of the Supreme Court in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), discredits the fraudulent claim argument but recognizes that practical limits upon liability will be necessary. See notes 187-89 *infra*. Moreover, the Supreme Court of Hawaii, which has followed *Dillon* enthusiastically (see note 192 *infra*), recently held as a matter of law that a plaintiff's upset, though clearly genuine, was too remote to have been foreseen by the defendant. See note 195 *infra*.

than "reasonable foreseeability." The problem tends to arise only rarely in cases involving harm caused by tangible invasions of the plaintiff's person or property due to built in, de facto limitations on the capability of most actors physically to alter their environment. Therefore, in most negligence cases involving direct physical impact on the plaintiff, the open-endedness of the proximate cause concept as a limitation upon liability has proven to be both adequate from the practical viewpoint and relatively harmless from the process viewpoint.¹⁸⁰ And in the rare instances where de facto limitations have not kept defendant's exposure to liability for physical harm to others within sensible bounds, courts¹⁸¹ and legislatures¹⁸² have stepped in with formal limits on liability.

However, the situation with respect to negligently caused mental and emotional upset without impact is different. In these cases, relatively mundane accidents have the potential of affecting multitudes of plaintiffs. Therefore, in cases involving mental upset without impact, courts have traditionally refused to leave the question of the extent of defendant's liability to be decided on so open-ended a basis as the "reasonable foreseeability" test of proximate cause. Instead, they have turned to the conceptual source of liability in negligence—the duty of care owed

¹⁸⁰ Thus, although at first glance the proximate cause concept appears to violate the principle that limits on liability must be formal, in actuality it is harmless in most instances. The relative harmlessness of the proximate cause concept stems from the fact that in most cases involving direct physical impact, the judge in responding to a motion for a directed verdict can apply the foreseeability test in a "let the chips fall where they may" fashion—i.e., the judge can apply it in a more or less mechanical fashion in light of what are perceived to be the relevant probabilities that harm of a particular sort would be caused by defendant's conduct. And once the issue gets to the jury, it probably ceases to be an issue—i.e., once the jury struggles to a conclusion regarding the central issues of fault and cause-in-fact, they are unlikely to be influenced by so esoteric and legalistic a notion as "proximate cause." Of course, to the extent that litigants, judges, and juries occasionally actually take the proximate cause concept seriously, it unquestionably presents significant difficulties. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41 at 236 (4th ed. 1971).

¹⁸¹ A classic example of a formal, court-made rule limiting the defendant's liability well within the bounds of foreseeability appears in *Ryan v. New York Central R.R.*, 35 N.Y. 210 (1866), in which the defendant's liability in negligence for harm caused by fire was limited, as a matter of law, to the first adjoining building. See also note 177 *supra* and notes 184 and 199 *infra*.

¹⁸² Perhaps the most striking example of a situation in which the traditional de facto limitations have proven insufficient involves the potentially catastrophic harm which might be caused by the breakdown of a large nuclear power facility. Consistent with the present analysis, Congress has provided practical limits on potential liability via the Price-Anderson amendment to the Atomic Energy Act of 1954. See 42 U.S.C. §§ 2011-2281 (1964). The limit on liability was set at \$500 million in 1970, with an agreement to indemnify out of federal funds, up to those limits, the victims of such a catastrophe. See 42 U.S.C.A. § 2210(c) (Supp. V, 1970). See generally England, *Nuclear Insurance and the Price-Anderson Act*, 13 *ATOMIC ENERGY L.J.* 27 (1971); Keyes & Howarth, *Approaches to Liability for Remote Causes: The Low-Level Radiation Example*, 56 *IOWA L. REV.* 531 (1971).

to others in society—and have defined it in a way which places severe and formal limits upon recovery for negligently caused fright (or other mental upset) without impact. The first such rule to emerge required impact upon the plaintiff's person as a prerequisite to recovery in negligence.¹⁸³ In time, a number of jurisdictions replaced the so-called "impact rule" with a more liberal, but nevertheless relatively formal, rule that allowed plaintiffs within the zone of physical danger from defendants' conduct to recover for upset caused by fear for their own safety.¹⁸⁴ Again, it will be observed that both the impact and the zone-of-danger rules serve two basic functions: first, the social policy function of placing practical limits on negligence-based liability which have at least some relation to the probable merits of individual cases; and second, the process function of accomplishing these limitations in a sufficiently formal manner to render the negligence concept adjudicable in the wide range of cases in which plaintiffs seek to recover for mental and emotional upset.

The opinion of the Supreme Court of California in *Dillon v. Legg*,¹⁸⁵ in which the traditional impact and zone-of-danger rules were discarded in favor of determining the worthiness of plaintiffs' claims on a case by case basis, deserves to be enshrined as one of the great examples in our law of a court abandoning decision-by-rule in the name of social justice. My criticism of this decision is not directed at the accuracy of the court's recitation of the shifts in social attitudes towards compensating accident victims (the opinion refers to "the natural justice upon which the [plaintiff's] claim rests"),¹⁸⁶ nor is it directed at the result reached on the facts (the plaintiff was a mother who, although outside the zone of danger, allegedly suffered emotional trauma and resulting physical injury from witnessing the negligently caused death of her minor child.) In fact, I am ready to accept as a premise that shifts in social values now require some more liberal rule fixing limits on liability in so-called "fright without impact" cases. However, I insist that whatever the content of such a rule, it must be stated in relatively formal terms, and therefore I must reject the court's conclusion to the contrary on this important process issue.

Although the opinion at one point seems to suggest that formal limitations will be required to be established in future cases,¹⁸⁷ read as

¹⁸³ See note 177 *supra*.

¹⁸⁴ The leading case is *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). See also *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965); *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970).

¹⁸⁵ 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹⁸⁶ *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

¹⁸⁷ *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

a whole it is clear that the California court in *Dillon* is opting for a case by case, under-all-the-circumstances resolution in these cases:

Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability *such duty or obligation must necessarily be adjudicated only upon a case-by-case basis*. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.¹⁸⁸

The opinion offers a cluster of three factors which, among others, presumably will permit courts in the future to achieve "natural justice" in every case.¹⁸⁹ That the majority in *Dillon* embraces the naive belief that adjudication can solve even the most open-ended problems, and therefore that a "cluster of factors" approach will prove adequate as a basis upon which to adjudicate future cases, is clear from these confident assertions towards the end of the opinion: "The test that we have set forth will aid in the proper resolution of future cases. Indeed, the general principles of tort law are acknowledged to work successfully in all other cases of emotional trauma. . . . If we stop at this point . . . we must necessarily question and reject . . . the viability of the judicial process for ascertaining liability for tortious conduct itself."¹⁹⁰

That my concerns over the possible adverse impact of *Dillon* upon the integrity of the torts process are not altogether unfounded is borne out to some extent by what has happened since that decision. Torts writers, as I have come to expect, have been almost unanimous in their praise of both the result and its suggested methodology.¹⁹¹ Courts in several other jurisdictions have followed the decision, and have extended it to different, and from a process perspective, more troublesome, fact patterns.¹⁹² To the three factors deemed relevant in the *Dillon* opinion

¹⁸⁸ *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 747-48, 441 P.2d at 925, 69 Cal. Rptr. at 85.

¹⁹¹ See, e.g., Stone, *Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 TUL. L. REV. 782 (1974); Comment, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HAST. L.J. 1248 (1974); Note, *Tort Law—Emotional Disturbances and Resulting Physical Injuries Occasioned by Negligence*, 8 U. RICH. L. REV. 366 (1974); Note, *Torts—Recovery for Physically Manifested Mental Disturbance—Towards a More Liberal Negligence Approach*, 10 WAKE FOR. L. REV. 187 (1974); Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176 (1974).

¹⁹² See, e.g., *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I. 1973) (plaintiff, out of zone of danger, witnessed mail truck run over four year old son); *Rodrigues v. State*,

have been added others, increasing exponentially the open-endedness of the "under all the circumstances" approach.¹⁹³

And yet, I must concede that there are indications that my worst fears will not materialize. For one thing, a number of jurisdictions which have considered *Dillon* have rejected it as unworkable.¹⁹⁴ Moreover, even where the *Dillon* holding has been followed, there are indications that a more formal and manageable, albeit more liberal, limitation on liability in these cases will eventually be worked out.¹⁹⁵ Thus, the recent trend towards liberalization of the traditional rules governing recovery for negligently caused fright without impact reveals the familiar pattern of courts flirting with disaster without actually confronting it. Clearly, these cases reflect the current tendency of courts to abandon formal limitations upon negligence-based liability together with the tendency of torts writers to push courts in this direction. However, the decisions thus far reveal that courts may not go so far as to expose themselves to the risks which would inhere in any wholesale commitment to doing justice on the facts of each particular case.

52 Hawaii 156, 472 P.2d 509 (1970) (husband and wife suffered upset from unwitnessed flood damage to house); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974) (ten year old, out of zone of danger, witnessed death of stepgrandmother); *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140 (1973) (mother, out of zone of danger, witnessed daughter killed by truck).

¹⁹³In *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I. 1973), the court listed five factors which would in combination determine the foreseeability of the presence of a parent at the scene of an accident involving a child: the age of the child, the type of neighborhood, the familiarity of the tortfeasor with the neighborhood, the time of day, and "all other circumstances which would have put the tortfeasor on notice of the likely presence of a parent." 354 F. Supp. at 820. See also Stone, *Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 TUL. L. REV. 782 (1974):

The test should . . . be . . . whether the judge or jury is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable.

Id. at 793.

¹⁹⁴See, e.g., *White v. Diamond*, 390 F. Supp. 867 (D. Md. 1974); *Jelley v. LaFlame*, 108 N.H. 471, 238 A.2d 728 (1968); *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419 (1969); *Wetham v. Bismark Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Guilmette v. Alexander*, 128 Vt. 116, 259 A.2d 12 (1969).

¹⁹⁵See, e.g., *Kelley v. Kokua Sales & Supply, Ltd.*, — Hawaii —, 532 P.2d 673 (1975), in which recovery was sought on behalf of the decedent whose daughter and granddaughter were killed in an automobile accident in Hawaii. The decedent learned of the deaths by telephone while he was in California and suffered a fatal heart attack. The Supreme Court of Hawaii affirmed a summary judgment for the defendants, the court concluding that such a consequence was unforeseeable as a matter of law. I submit that the court is using foreseeability in some special, though as yet unarticulated, manner, and that several more cases of this sort should suffice to reveal the new limits on liability for fright without impact in that jurisdiction.

b. Liability for Economic Harm

My interest in this subject in the present context stems entirely from a recent decision in the United States Court of Appeals for the Ninth Circuit, *Union Oil Co. v. Oppen*,¹⁹⁶ in which the traditional rule denying negligence-based recovery for pure economic harm¹⁹⁷ was thrown over in favor of determining liability on the basis of reasonable foreseeability. The plaintiffs in that case, commercial fishermen, sought to recover for profits allegedly lost when the defendants' negligent oil spillage harmed fishing grounds off the coast of Santa Barbara, California. Affirming a denial of defendants' motion for summary judgment, the court of appeals drew upon the decision of the Supreme Court of California in *Dillon v. Legg*¹⁹⁸ and established the same type of "cluster of factors" test as was there applied to the fright without impact problem.

The relevance of *Oppen* to the present analysis should be clear. Whatever may be said for the substantive social policies underlying the traditional rule denying recovery for negligently caused economic harm,¹⁹⁹ from our process perspective the rule serves the necessary function of placing practical limits upon liability without necessitating a case by case analysis of whether recovery by the plaintiff is in the best interests of society. Economic harm shares with mental upset a characteristic open-endedness which has traditionally prompted courts to impose limits upon potential exposure to liability for even foreseeable harm.²⁰⁰ Once the decision is reached that limits other than foreseeability are required, my analysis strongly suggests that those limits must be relatively formal if the integrity of the judicial process is to be preserved. As the court in *Oppen* makes clear,²⁰¹ exceptions to the rule denying liability for economic harm have been recognized over the years;²⁰² but I submit that all of the exceptions share a certain for-

¹⁹⁶ 501 F.2d 558 (9th Cir. 1974).

¹⁹⁷ See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 at 952 (4th ed. 1971); Harvey, *Economic Losses and Negligence*, 50 CAN. BAR REV. 580 (1972).

¹⁹⁸ 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹⁹⁹ The opinion in *Oppen* refers to "the proposition that a contrary rule, which would allow compensation for all losses of economic advantages caused by defendant's negligence, would subject the defendant to claims based upon remote and speculative injuries which he could not foresee in any practical sense of the term." 501 F.2d at 563. See generally 88 HARV. L. REV. 444, 447-50 (1974).

²⁰⁰ See text accompanying notes 183-84 *supra*.

²⁰¹ See 501 F.2d at 565-68.

²⁰² E.g., where there is a special, often contractual, relation between the parties; where the defendant is engaged in certain professions, businesses, or trades; or where the plaintiff has suffered tangible injury to person or property.

mality which allows them rationally to be subjected to adjudication.²⁰³ In purporting to move to a "foreseeability under all the circumstances" test, the *Oppen* court clearly joins ranks with what I have referred to throughout this analysis as the growing retreat from the rule of law.

As a practical matter, I doubt that the decision will have a significant impact. The same result apparently could have been reached in that case on narrower legal grounds, which may detract from its strength as precedent.²⁰⁴ Moreover, the court expressly refused to extend its holding to persons—*e.g.*, shoreline businessmen—other than commercial fishermen who may foreseeably have suffered economic harm from the oil spill,²⁰⁵ thus contradicting its commitment to foreseeability as the true limit of defendants' liability. But these defects aside, the decision represents a clear example of a court compelled by social pressures to abandon the rule of law in favor of an approach which, were it extended very far, would lead to chaos. That the *Oppen* court may have been beguiled and misled by the sort of open-ended scholarly analysis of legal problems currently in vogue is suggested by that portion of the opinion in which "guidelines" from recent economic analyses are employed as alternative means of reaching a decision.²⁰⁶ The unnerving spectacle of the court purporting to apply so open-ended a standard as the "cheapest cost avoider" in reaching its conclusion is one which I am sure even the author of that currently popular idea never anticipated nor intended.²⁰⁷

²⁰³ I hope that by now the basic pattern of the traditional common law approach to potentially difficult areas is clear: a general no-duty rule, subject to a system of relatively formal, and therefore adjudicable, exceptions. This is the basic pattern observed earlier in connection with the pre-*MacPherson* privity rule in products cases, *cf.* notes 41-45 *supra* & text accompanying, and the pre-*Rowland* rules governing liability of possessors to persons coming on the land, *cf.* notes 151-57 *supra*. These traditional "no-duty exceptions" systems support what I have in my first year torts classes called the "layered analysis" approach to legal problems. For a recent article which seems to reach the same conclusion—*i.e.*, that a certain amount of layered analysis is necessary to the proper functioning of adjudication—see Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

²⁰⁴ For an argument that the same result could have been reached under public nuisance doctrines, see 88 HARV. L. REV. 444, 446-47 (1974).

²⁰⁵ See 501 F.2d at 570-71.

²⁰⁶ See 501 F.2d at 569-70, wherein the court attempts to apply the concept of "the cheapest cost avoider" to reach its result. *Cf.* G. CALABRESI, *THE COST OF ACCIDENTS* 69-73 (1970).

²⁰⁷ In a recent article, Professor Calabresi recognizes that his general theories must be translated into sufficiently specific rules, or "categories." See Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1070 (1972). In that same article, he expresses some doubt that courts will be able to work these rules out. See *id.* at 1077-78. I should make clear that I am not opposed to courts making use of concepts such as "cheapest cost avoider" as general policy backdrops to the application of more formal rules of decision. It is just that such a concept is, in and of itself, too open-ended to serve as the rule of decision. *Cf.* notes 201-03 *infra* & text accompanying.

C. *The Role of Torts Commentary in Hastening the Retreat*

As I have indicated throughout the preceding analysis, torts commentary in recent years has been overwhelmingly in favor of expanding and purifying the negligence concept. Although I have no data which clearly establish that this commentary has had a significant impact upon our courts, and although judges have occasionally rejected some of the more outlandish aspects of these scholarly entreatments, I am probably justified in assuming that such commentary has hastened the developments to which I have referred. From our present perspective, one of the most interesting aspects of torts scholarship has been its tendency to focus upon the substantive content of the rules of liability, together with underlying social policy objectives, almost to the total exclusion of any concern for the process implications of proposed reforms. A deep-rooted distrust of legal formality, combined with a commitment to compensating accident victims and an abiding faith in the capacity of adjudication to solve any problem on a "reasonableness under all the circumstances" basis, has all but eliminated serious consideration of the sorts of questions I have tried to raise. Consequently, any doctrine or rule of law which creates a formal impediment to imposing liability for all harm foreseeably caused by unreasonably risky conduct tends to be condemned automatically by a majority of writers as an unjustifiable hold-over from a more conservative, by-gone social era.

To this largest category of torts commentary may be added a smaller but nevertheless influential category which tends equally to reflect indifference towards the process problems of implementing principles of liability. In recent years, legal writers have begun to employ economic theory in analyzing torts problems.²⁰⁸ The tendency has been to advance very broad, very basic principles of liability, against which existing doctrines are judged and upon which they are criticized. Although the necessity of translating these broad principles into workably specific rules of decision has been recognized,²⁰⁹ very little of the sort has actually been accomplished. And when a writer employing economic analysis does occasionally translate his theories into proposed modifications of the common law, the result is likely to be unworkable and unmanageable from the perspective of the limits of adjudication.²¹⁰ Economic analysis has made a very real contribution to our growing under-

²⁰⁸ See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

²⁰⁹ See, e.g., Calabresi & Hirschoff, *supra* note 207.

²¹⁰ See, e.g., Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201 (1971). Although the author does assert that the form of the rule is not his main concern, *id.* at 217, it is clear that he advocates a "cluster of factors" approach similar to the approaches criticized throughout the present article. See *id.* at 214.

standing of the policy objectives underlying our system of law. Thus far, however, writers employing these principles have appeared relatively indifferent to the problems I have tried to raise here. Focusing as they do upon the substantive policy objectives of our system, they have tended to ignore the realities of the limits of adjudication.

If indifference and insensitivity to process problems were all that judicial integrity had to overcome in its struggle for survival amidst the expansions of negligence law in recent years, the role of legal commentary would scarcely deserve to be labelled "irresponsible." However, there is a third category of torts commentary to which I must reluctantly apply that label. These are commentaries which tend to speak of the common law torts judgment as a tool of harassment in modern political warfare, and whose disregard for judicial integrity approaches recklessness. Thus, in law journals in recent years have appeared statements such as "The courts have become the major political arena in which people's rights are being redressed and protected. . . . Tort law is a very big part of the people's courtroom power. . . . Tort suits are an avenue which groups and classes of people can use to have an input into the behavior of institutions which in turn . . . affect the quality of their lives."²¹¹ And "The New Torts will concern itself with remedies against the abuse of power—political, economic, intellectual, as well as physical.

The conclusion is that the New Torts must be made to deal more explicitly with the question of what large enterprises and other clusters of power owe to the individual caught in their toils. . . . The New Torts then will emphasize more sharply the question of what defendants representing significant clusters of different kinds of power owe to our civilization in the way of behaving in a civilized manner."²¹² I cannot imagine statements more inconsistent with the realities and limitations of the judicial process. If they truly speak for the future, then we all had better start looking for another line of work.

In reacting critically to the indifference of torts commentators to the process problems I have raised, I do not intend to suggest that I am the first person to voice concern over the process implications of recent developments in negligence law. Over the years, writers have questioned the propriety of courts implementing the negligence concept with no more formal guide to decision than "what is reasonable under all the

²¹¹ Sulnick, *A Political Perspective of Tort Law*, 7 *LOV. L.A.L. REV.* 410, 423-24 (1974).

²¹² Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 *STAN. L. REV.* 330, 333-35 (1970).

circumstances.”²¹³ For example, there could be found no clearer statement of the basic position I have tried to advance than the following excerpt from a review in 1959 of a then-recently published torts treatise espousing the “let the jury decide on all the circumstances” approach:

There is much more at stake here than superficially appears, for a “law” of negligence derived from such all-encompassing generalizations as these is not a system of law at all, but only a conceptual conduit through which all cases are funneled into the jury room. . . . The actual criteria for the adjudication of the claim will be solely those which the particular jury, in the individual case, chooses in its uncontrolled discretion to apply in the secrecy of the jury room, unencumbered by the embarrassing necessity of explaining its decision. . . . To me this involves a shocking abdication of judicial responsibility which is in no measure made more commendable by the fact that its proponents see it as an indirect approach to a basis of liability in tort which they deem preferable to that recognized in the past.

It is, then, entirely possible that without being conscious of what we are doing we may jettison completely the intricate system by which our forebears sought to achieve a modicum of what we have called “rule of law” in favor of one by which disputes between individuals will be committed to the uncontrolled discretion of the tribunal. . . . There are those who view this as the ultimate flowering of the democratic method, and for that reason as a desirable development. I do not.

Its substantial acceptance by the courts would, it seems to me, subject to grave question the continuing validity of the common law system itself.²¹⁴

If I possess any advantage in writing now of these same concerns, it certainly does not inhere in any edge in eloquence over the author of the preceding excerpt. Rather, it may be the advantage of being able to look back over the intervening seventeen years and to document the “substantial acceptance by the courts” of the principle of decision-by-discretion to which the author despairingly refers in the last sentence of his review.

CONCLUSION

Reviewing the reforms and developments in negligence law in recent years, a pattern quite clearly emerges. Gradually, the negligence con-

²¹³ See, e.g., R. KEETON, *VENTURING TO DO JUSTICE* 67-69 (1969); Cooperrider, *A Comment on The Law of Torts*, 56 MICH. L. REV. 1291 (1959); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931); Hoening & Goetz, *A Rational Approach to “Crashworthy” Automobiles: The Need for Judicial Responsibility*, 6 SW. L. REV. 1 (1974); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

²¹⁴ Cooperrider, *supra* note 213, at 1310-12.

cept has been expanded and purified to the point that courts are beginning routinely to confront problems which are beyond their capacity to solve. Some areas of recent reform are practically and economically more significant than others, and in some, courts generally have resisted the temptation to follow early leads which would have exposed them to process difficulties in the name of trying to achieve individualized justice in every case, but all of these areas of reform represent potential threats in principle to the integrity of the judicial process. Torts commentary during this same period of change has been woefully insensitive to both the source and the magnitude of these threats. By and large, torts writers and scholars have encouraged and supported the expansionary trend, and have evinced a naive and misplaced confidence in the ability of courts to solve all of society's problems through the application of principles of tort liability. At the very least, much of what has been written in recent years deserves to be, and I believe one day will be, adjudged undisciplined. At their worst, some of the recent commentaries have been irresponsible.

Throughout this article I have referred to the mounting threat to judicial integrity in essentially theoretical terms. If courts are beginning to abandon principled decisionmaking in these cases, then as professionals we ought to deplore this circumstance quite apart from whether, as a practical matter, the incidental enlargement of the opportunity of injured plaintiffs to recover damages happens to suit our politics. But for those to whom practical politics is everything, and for whom a sacrifice of means is acceptable if it achieves desired ends, let us consider practicalities for a moment. If I am right, and we have reached the point where our zeal for expansion and purification of negligence law is running away with us, then the problems which lie ahead are most certainly not limited to the theoretical variety. Once the negligence-under-all-the-circumstances lottery is seen for what it is, the expense and inefficiency associated with it will make a wide range of alternatives socially attractive.²¹⁵ (In fact, the only persons who will stand to benefit from its continuance will be torts lawyers and scholars.) When that day arrives, and the torts process has finally been replaced by some more efficient and honest (albeit "dehumanized") mode of compensating victims of accidents, we shall have more than enough leisure time to sit and ponder the wisdom of the parable of the goose and the golden egg.

²¹⁵For some idea of what the alternatives might look like in the fields of products liability and medical malpractice see J. O'CONNELL, *ENDING INSULT TO INJURY* (1975).

Can anything be done to arrest these destructive tendencies and to put the torts process back on the right track? For one thing, I have an abiding faith in the collective common sense (not to mention the instinct for survival) of the judges whose primary responsibility it is to administer our torts system. Our common law process has survived for hundreds of years, and it is probably presumptuous to assume that it should finally have met its match in the concept of negligence-based tort liability. For another, it would be helpful if torts writers and scholars would face up to the realities of the limits of adjudication and begin tempering their zeal for social politics with a measure of respect for the process implications of their proposals. Once again, I must emphasize that I do not object to reform, as such, but only to irresponsible reform. We need not necessarily cling to traditional doctrinal formalities in the face of changing social attitudes which call into question their substantive content, although in most instances I would urge a strong presumption in favor of their continuing validity. But in adapting and reforming traditional tort doctrines to meet new and different social conditions, we must recognize the necessity of retaining a sufficient measure of formality in the rules governing liability. Courts must have the courage to say "No" to plaintiffs who fail to satisfy the formal prerequisites to recovery, and torts commentators must have the common sense to support them in this respect.

Of course, the common law system of negligence-based liability may be beyond saving. It will be recalled that I began my analysis of recent reforms and developments with the premise that there was nothing wrong, per se, with the negligence concept from a process perspective. Quite possibly, this assessment may have been wrong. It may turn out that the negligence concept bore within itself, from the very beginning, the seeds of its own destruction. Because it was thought to be necessary in the mid-nineteenth century to limit the strict liability of institutional actors engaging in socially beneficial but nonetheless risky conduct, the negligence principle was introduced;²¹⁶ and because it was possible socially to justify formal limitations upon that principle, it flourished for a time in good health. But because these formal limitations were destined eventually to be attacked as antithetical to the growing trend towards socialization of accident costs, and because the abandonment of these formalities would expose courts to unadjudicable problems of social planning, the negligence concept may have been doomed from the start. From the process perspective, the only workable systems

²¹⁶ See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 29 at 140 (4th ed. 1971); Winfield, *The History of Negligence in the Law*, 42 L.Q. REV. 184 (1926).

of torts liability may be those based upon one form or another of strict liability. Negligence, it may turn out, was an essentially unmanageable and therefore self-destructive method of getting us from one system of strict liability to another.²¹⁷ In any event, this much seems certain: unless sufficient formality is preserved, and in some instances reintroduced, in the rules governing liability, our common law negligence system will not survive to the end of this century.

²¹⁷ See generally Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976).